Supreme Court, U.S.
FILED

01-621 OCT 11 2001

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

S. REBECCA DACHMAN,

Petitioner,

v.

TOMMY THOMPSON, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition For A Writ For Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

S. REBECCA DACHMAN
P.O.B. 3370
Silver Spring, MD 20918
301-526-2453

128pp

QUESTIONS PRESENTED

1. As a matter of law is it a violation of Title VII, 42 U.S.C. § 2000(e), to include restrictions on religious accommodation in a leave restriction letter?

2. As a matter of law, is it a violation of Title VII, 42 U.S.C. § 2000(e) if the employer restricts the type of work permitted during religious compensatory overtime, whereas no such restriction exists during the normal work week?

3. As a matter of law, is temporal nexus to a religious observance sufficient showing of need to distinguish between preference and practice for accommodation or are there additional criteria that have to be demonstrated to define that an action is a religious practice which warrants accommodation and not secular preference?

4. Do the decisions of the lower Courts wherein the Courts made significant erroneous determinations, represent sufficient error to justify vacating the decisions of the Courts on the merits of the case?

LIST OF PARTIES

Petitioner is S. Rebecca Dachman, M.D.

The respondent is Tommy Thompson, Secretary of Health and Human Services.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of this Court, Petitioner, S. Rebecca Dachman, M.D. states she has no parent corporation.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Rule 29.6 Statement ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions 1

Introduction 2

Statement of the Case 4

A. Nature of the Case 4

B. Statement of Facts 5

C. Procedural History 9

Reasons for Granting the Writ 10

Conclusion 16

Appendix A – Appellate Memorandum and Decision ..... App. 1

Appendix B – District Court Memorandum ..... App. 14

Appendix C – Order of April 13, 1999 ..... App. 62

Appendix D – Order of May 12, 1999 ..... App. 64

Appendix E – Memorandum of March 6, 2000 App. 66

Appendix F – Order of March 6, 2000 ..... App. 70

Appendix G – Order of March 17, 2000 ..... App. 71

TABLE OF CONTENTS – Continued

Page

Appendix H – Order of May 16, 2000.....App. 73

Appendix I – Memorandum and Order of September 14, 1999.....App. 74

Appendix J – Order of July 13, 2001.....App. 76

Appendix K – Statement of Issues in Appellant's Brief.....App. 79

Appendix L – Complaint for Relief Noting Leave Restricting is Discriminatory (see #24).....App. 82

Appendix M – E-mail Noting Dr. Keegan did not sign RCT Leave Slip.....App. 90

Appendix N – Agency Acknowledgment that RCT is Not Leave.....App. 92

Appendix O – RCT Policy.....App. 93

Appendix P – Government's Response to Requests for Admission: Admission that the Government Destroyed Dr. Dachman's Time and Attendance Records (See #20).....App. 99

TABLE OF AUTHORITIES

Page

CASES

Abramson v. William Paterson College of New Jersey No. 00-5026 (3rd Cir. 2001) 16

Ansonia vs. Philbrook, 479 U.S. 60 (1986) 13

Balint vs. Carson City, 180 F.3d 1047 (1999) 12

Brown vs. General Motors, 601 F.2d 956 (1979) 14

Brown vs. Polk County, 61 F.3d 650 (1995) 14

Burlington Industries vs. Ellerth, 524 U.S. 742 (1998) 3

City of Boerne vs. Flores Archbishop of San Antonio, 521 U.S. 507 (1997) 9, 12

Cooper vs. General, 533 F.2d 163 (1976) 16

Faragher vs. Boca Raton, 524 U.S. 775 (1998) 3

Fowler vs. Rhode Island, 345 U.S. 67 (1953) 15

Harris vs. Forklift, 114 S. Ct. 367 (1993) 3

Hishon vs. King & Spaulding, 104 S. Ct. 2229 (1984) 3

Jordan vs. North Carolina Nation's Bank, 399 F. Supp. 172 (1975) 13

McDaniel vs. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978) 14

Redmond vs. GAF Corp., 574 F.2d 897 (1978) 14

Sherbert vs. Venter, 374 U.S. 398 (1963) 11

Thomas vs. Review Board of Indiana Employment Security Division, 450 U.S. 707 (1981) 15

Tiano vs. Dillard Dep't Stores, 139 F.3d 679 (9th Cir. 1998) 5, 15

TABLE OF AUTHORITIES – Continued

Page

Trout vs. HHS EEOC, #01842801 14

Vetter vs. Farmland Industries, Inc., 883 F. Supp. 1287 (1995) 14

Wisconsin vs. Yoder, 406 U.S. 205 (1972) 11

STATUTES

28 U.S.C. § 1254 1

42 U.S.C. § 2000(e) 1, 9

REGULATORY MATERIAL

5 C.F.R. 713 ..... 1, 3

HHS-550-11 1

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit in S. Rebecca Dachman v. Donna E. Shalala, Secretary of Health and Human Services is reprinted in Appendix A. The order of the Court denying Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix J. The memorandum opinions and orders of the District Court is reprinted in Appendices B and E. The orders denying plaintiff's Motions for Reconsideration are reprinted in Appendices D, F, and H.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 18, 2001. The Judgment of the Court of Appeals denying Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was filed on July 13, 2001.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

Statutes regarding Title VII of the Civil Rights Act are 42 U.S.C. § 2000(e). Additional relevant statutes are 5 C.F.R. 713 and HHS 550-11.

INTRODUCTION

In 1964 the federal government passed the landmark Civil Rights Act of 1964, a critical document in defining the contours of organizational and workplace responsibilities toward employees. The law made it unlawful to discriminate against individuals in employment situations on the basis of race, national origin, sex, and religion. The relevant language of the law reads:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individuals' race, color, religion, sex or national origin. Or to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee because of such individuals' race, color, religion, sex, or national origin."

In 1972 the act was amended and defined an affirmative requirement on the part of an employer to accommodated religious practices unless there was undo hardship:

> "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's religious observance without undo hardship on the conduct of employer's business."

The 1972 amendments also expanded the Act to include government employees. This statutory authority

enacted by Congress cemented EEOC's ability to enforce equal opportunity and is delineated in 5 C.F.R. 713:

> "It is the policy of the Government of the United States and of the Government of the District of Columbia to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency."

Since 1990, Supreme Court decisions have further refined the scope of the Civil Rights laws. In 1993, *Harris vs. Forklift,* 114 S. Ct. 367 (1993) defined the issue of hostile environment and stated Title VII was not limited to economic or tangible discrimination but extended to the entire spectrum of workplace treatment. *Faragher vs. Boca Raton,* 524 U.S. (1998) established that a supervisor could be vicariously liable for workplace discrimination and harassment. *Hishon vs. King & Spaulding,* 104 S. Ct. 2229 (1984) determined that a benefit need not be employment but need only be a term, condition or priviledge of employment. In *Burlington Industries vs. Ellerth,* 524 U.S. (1998) the Court expanded the precept further and indicated that there could be discrimination even if there was no adverse employment consequences.

In the case at bar, Petitioner was subjected to overt harassing religious/racial comments at the worksite by supervisory personnel. In addition, she was subjected to disciplinary actions, such as leave restriction, which specifically targeted her religious practices, prevented accommodation of her religious needs and ultimately led to her

termination from federal service. The case raises 3 critical questions:

1. Is it a violation of Title VII of the Civil Rights Act to include restrictions on religious compensatory time which do not accommodate an employee's religious requests, in a leave restriction letter?

2. If an employee has discretion to determine their work agenda during the week, is it a violation of Title VII of the Civil Rights Act to place additional restrictions on the type of work permitted during religious compensatory overtime if such restrictions are not applicable during the work week and interfere with the employee's ability to perform religious compensatory overtime?

3. What guidance and criteria can the Court give to lower courts to distinguish between personal preference in religious requests and actual practice? Is temporal nexus to a religious observance sufficient evidence of practice to require affirmative accommodation on the part of an employer? Is traditional practice sufficient to form the basis for an accommodation request or are requests only applicable if based on mandatory religious statutes?

STATEMENT OF THE CASE

A. Nature of the Case

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on May 18, 2001. That opinion affirmed the District Court's decisions on April 13, 1999 and March 6, 2000, to grant summary judgment

to the defendant. The District Court stated that plaintiff did not have a claim of religious discrimination because "challah", the ceremonial bread, that is by practice eaten during the Sabbath meal is not a mandatory religious requirement. As such Plaintiff's request for accommodation so that she could leave work early on Friday and buy challah and prepare for the Sabbath prior to the Sabbath was invalid.

The Appeals Court, while acknowledging that challah was a deep rooted tradition, stated Petitioner's request to leave early was based on personal preference rather than practice and thus affirmed the District Court's opinion.

The lower Courts, thus, citing *Tiano vs. Dillard Dep't Stores*, 139 F.3d 679 (9th Cir. 1998) indicated that practices that are not mandated by religious statute are personal preference and therefore do not warrant accommodation. Furthermore their opinions validate placing restrictions on religious accommodations even when there is no undo hardship to the employer and encourage personnel practices that restrict the accommodation an employee has while completing religious compensatory time and religious compensatory overtime.

B. Statement of Fact

Dr. Dachman, an Orthodox Jewish female physician, was employed by the FDA as a medical officer from June 1988 until her termination in February 1998. Her evaluations rated her as excellent to outstanding until 1994 and she was considered an expert in her area. At all times

relevant to this complaint Dr. Dachman's overall performance evaluations met performance standards. Her last in-grade increase in salary was in July of 1997. In early 1993, Dr. Dachman's office underwent a reorganization and she came under new supervisors, Drs. Siegel and Weiss, who were Jewish but not Orthodox. Dr. Dachman's new supervisors demonstrated animosity to her religious practices and would demean Dr. Dachman by making comments such as calling her Menegele, an allusion to the infamous doctor at Auschwitz, when they disagreed with her (knowing her mother was a survivor of Auschwitz) and not changing meetings that conflicted with her religious observances. In June 1994, the largest project ever submitted to the FDA, which Dr. Dachman had been working on for 4 years, was unanimously approved. Subsequent to the approval meeting, Dr. Dachman was subjected to additional supervisory oversight and far more discriminatory actions. In July 1994 she was falsely arrested based on fraudulent sworn statement of her new supervisor, Dr. William Schwieterman (who had less seniority and experience than her). In that statement he mocked her distinctive New York accent. After the criminal case against her was nolle prossed in December, 1994, Dr. Dachman was improperly suspended twice, placed under surveillance along with her children, was detailed and then permanently reassigned against her will to another position for which she had insufficient training. Furthermore her request for a detail to another division in FDA which expressed interest in possibly hiring her was denied. In addition, in November 1995, based on disputed and erroneous calculations, Dr. Dachman was placed on leave restriction, by another new supervisor,

Dr. Keegan, who was under the command of Drs. Siegel and Weiss (as Dr. Schwieterman was). Significantly the leave restriction letter restricted the religious accommodation and religious compensatory overtime program that Dr. Dachman had been accustomed to for the preceding 7 years. It allowed her "up to 2 hours leave before sunset" on Fridays for religious needs whereas previously she had left the workplace around 1:30 – 2PM on Fridays to pick up her children, buy ceremonial foods such as challah for the Sabbath and prepare for the Sabbath at home since cooking and the use of electricity is prohibited on the Sabbath. To compensate for the additional time that she needed, Dr. Dachman in many cases used annual leave or leave without pay when she left early on Fridays. In addition, whereas Dr. Dachman had previously made up religious compensatory time on Sunday morning by reading medical journals and articles related to her projects, she no longer was allowed to do medical reading on Sundays (though she could read articles during the week). Dr. Dachman was given insufficient work so there was little for her to do on Sundays if she could not read and she could not fulfill the religious compensatory overtime requirement. This resulted in accruing additional leave without pay. In September, 1997, right after Dr. Dachman informed Dr. Keegan that she had substantive evidence that Dr. Mitrane, a coworker and friend of Dr. Schwieterman and Keegan, had made the call for which she had been arrested, Dr. Dachman was issued a proposal to remove based on alleged violations of the leave restriction policy and abuse of leave. A significant number of the alleged violations were due to the restricted religious accommodation policy that

were in the leave restriction letter. It also should be noted that Dr. Dachman's time and attendance records were destroyed prior to the writing of the proposal to remove, Appendix P. In February 1998, Dr. Dachman was removed from federal service based on the charges in the leave restriction letter. Until June 2000, Dr. Dachman was unemployed and only then reentered a re-training program which pays substantially less than her previous position. Her financial status is limited since she was divorced in October 1997 and is raising her 3 children. If the writ is granted, Dr. Dachman will obtain counsel to represent her.

As a matter of law, Dr. Dachman contends that the Agency directly discriminated against her religious beliefs when it included religious accommodation in the leave restriction letter, changing an accommodation pattern that had been successfully in place for 7 years. In addition, Dr. Dachman contends that the workplace, after the reorganization, was a hostile environment with respect to religion where Dr. Dachman was taunted and questioned regarding her beliefs, her accent and her lifestyle.

In this petition, Dr. Dachman respectfully requests that this honorable Court reverse the decisions and orders of the lower courts, remand the case and rule that:

1. It is discriminatory to include restriction on religious accommodation in a leave restriction letter.

2. It is discriminatory to place restriction on the type of work that can be done during religious compensatory overtime if there is employee discretion on work done during the work week, i.e.,

the terms and conditions of employment are different during religious compensatory overtime.

3. Temporal nexus to an established religious practice even if not mandated is sufficient evidence of religious observance to warrant accommodation if the employee seeks such accommodation.

C. Procedural History

The facts of this case arise under 42 U.S.C. § 2000(e). In March 1996, Dr. Dachman filed a 5 count complaint against the Department of Health and Human Services for discrimination based on sex, race, religion, retaliation and burden of free exercise of religion. The original complaint was amended twice, one to add Dr. Mitrane as a party and later to supplement the facts on record. Based on this Court decision in 1997 in *City of Boerne v. Flores, Archbishop of San Antonio*, 521 U.S. 507 (1997) the count based on the religious freedom restoration act was dismissed. The charges against Dr. Mitrane were dismissed because they were state claims and she was not in a supervisory position over Dr. Dachman. In 1999, the complaint was supplemented to add the removal from federal service. The District Court granted summary judgment to the defendant on all counts exclusive of the discharge in April of 1999. The Court stated that Dr. Dachman did not have bona fide religious beliefs because challah is not a mandated religious ceremonial requirement and that Dr. Dachman warranted discipline.

In March of 2000, the court granted the Government motion for summary judgment on the discharge for the aforementioned reasons ignoring that Dr. Dachman's original time and attendance records were destroyed.

Petitioner then appealed the decision to the 4th Circuit Court of Appeals. Oral arguments were heard on April 6, 2001 and on May 18, 2001. The Court affirmed the lower Court's decision stating that Dr. Dachman's request for accommodation represented personal preference rather than a religious practice. They also ignored that Dr. Dachman's time and attendance records were destroyed. A petition for rehearing was denied on July 13, 2001.

REASONS FOR GRANTING THE WRIT

The District Court and Appeals Court decisions do not appropriately address the salient issues requisite for accommodating religious observances. Since Sabbatists are only a small minority of the American population, each case that presents unique aspects that define the contours of the complex area of religious accommodation requires careful consideration and review. Therefore to assure equitable justice it is critical that the issues presented herein to this Court be evaluated and addressed in their entirety to foster consistent and reasonable interpretations in all Circuits with respect to 3 issues crucial to religious accommodation that are presented herein:

1. **Contrary to the position supported by the 4th Circuit and the District Court of Maryland in the case at bar, including restrictions on religious accommodation in a leave restriction letter is discriminatory.**

The law definitively states that accommodation of religious observances places the onus on the employer to

articulate a legitimate reason of undo hardship in order to vitiate an employee's request for accommodation. In the case at bar, the Agency in an unprecedented move, did not at any time articulate any undo hardship in accommodating Dr. Dachman's religious requests yet, because they were so numerous (App. N) and in order to develop a "paper trail" that would lead to discharge they restricted and placed additional burdens on her religious accommodations program by including religious accommodation in her leave restriction letter. Significantly, for 7 years prior to the imposition of the leave restriction, Dr. Dachman had an equitable religious accommodation program that did not cause any concern among her previous supervisors.

In *Sherbert vs. Venter*, 374 U.S. 398 (1963) and in *Wisconsin vs. Yoder*, 406 U.S. 205 (1972), this Court mandated that only a compelling interest of the government could mitigate accommodation requirements. Even when this Court ruled that the religious Freedom Restoration Act was unconstitutional, it did so because there was a "general law of applicability" that superceded the specific requirements of the Church. In the case at bar there was no "general law of applicability" regarding leave that could overrule accommodation. The leave restriction was a specific policy instituted against Dr. Dachman that then specifically restricted her religious accommodation, without defining any "undo hardship". Significantly the Agency singled out Dr. Dachman's religious observance even though it acknowledged (App. N) that religious compensatory time (RCT) and religious compensatory overtime (RCO) were not considered leave. Since the letter purposely targeted Dr. Dachman's religious needs

as a point of restriction, not inadvertently, as was the case in *City of Boerne vs. Flores*, supra, and then used alleged violations of that policy as a substantial part of the decision to remove Dr. Dachman from federal service, it clearly discriminated against Dr. Dachman. Furthermore, as was noted in *Baliant vs. Carson City*, 180 F.3d 1047 (1999), where a seniority system existed, the mere existence of a system or procedure does not relieve the employer of its responsibility to accommodate religious needs. Similarly here, the existence of potential policy of leave restriction does not justify the inclusion of religious accommodation in a leave restriction letter especially when the Agency acknowledges that RCT and RCO are not leave issues. Petitioner therefore respectfully requests that this court vacate the decisions of the lower courts.

2. Contrary to the position supported by the lower courts, placing additional restrictions on the work that can be done during religious compensatory time is discriminatory especially when there is employee discretion on work that is done during the work week.

The rules of accommodation require that an employer affirmatively accomodate an employee's request unless there is undo hardship on the part of the employer. This by corollary would include the right to determine what work could be done during RCO, otherwise all employers could direct employees to do such work that is not possible and therefore preclude RCO. In the case at bar, the agency prohibited Dr. Dachman from

reading medical journals related to the work she was reviewing during religious compensatory overtime though she could read during the week. They substantiated their actions on the basis that HHS manual (App. O) states that the employer could direct the work of religious compensatory time just as they do during overtime. This rule, though, is in violation of Title VII since RCO is an accommodation that is necessitated by religious observance and not an elective action. Placing additional restrictions on what can be accomplished during RCO violates Title VII's imperative not to discriminate based on the terms, conditions and privileges of employment.

This is especially true if the "accommodation" suggested by an employer does not resolve the employee's dilemma. In the case at bar, because of the additional restrictions placed on RCO, Dr. Dachman who anyway had little work, could not fulfill RCO and had to take LWOP which was a tangible economic loss. This is somewhat similar to the situation in *Jordan vs. North Carolina Nation's Bank*, 399 F. Supp. 172 (1975) where the court determined that not rehiring plaintiff because she wouldn't work on Saturdays constituted discrimination since there were many jobs that did not require Saturday work. In the case at bar, there was lots of reading that would have benefited Petitioner's work and would have allowed her to satisfy her RCO requirements but employer artificially refused to allow that accommodation. As in *Ansonia vs. Philbrook, supra,* the crux of the issue is whether the restriction specifically singled out religious observance, in the case at bar, that was the issue. Dr. Dachman could read during the week, she could read when accruing credit time but she could not read when

doing RCO, which is discriminatory. In *Brown vs. Polk County*, 61 F.3d 650 (1995), the Court recognized that a reprimand that focused on a religious action demonstrates awareness of religious needs and conflicts. So here, the leave restriction letter's focus on religious accommodation indicates that the Agency was very aware of Dr. Dachman's needs and were subversively trying not to accommodate her.

3. The Courts erred in determining that Dr. Dachman's religious requests were based on preferences and not practices.

This is an area of significant controversy that begs the Court's guidance. The dispute arises over criteria or templates that can be employed to determine when religious observances and practices warrant accommodation. In *McDaniel vs. Essex Int'l, Inc.*, 571 F.2d 338 (6th Cir. 1978), the court stated that the section on religion applies to all religious observances and practices and is not limited to claims of discrimination based on requirements of Sabbath work. Thus Courts have acknowledged the right to accommodation to lead a Bible class during work shift, as in *Redmond vs. GAF Corp.*, 574 F.2d 897 (1978) and in *Trout vs. HHS*, EEOC # 01842801 temporal proximity was sufficient to form the basis for accommodation without restriction. This concept of a connection between an observance and an employees religion is elegantly discussed in *Vetter vs. Farmland Industries, Inc.*, 883 F. Supp. 1287 (1995). Moreover, in *Brown vs. General Motors*, 601 F.2d 956 (1979), the Court was careful to state that there was no legitimacy to the concern that other employees would feel discriminated against because they did not

routinely get Friday night off nor would there be a rush of employees requesting Friday night off as there were only 4 Sabbath observers in the plant. Nevertheless, others, as in *Tiano vs. Dillard Dep't Stores* (1998) felt that the religious need to go on pilgrimage without specific temporal relationship was insufficient to state a claim for religious accommodation. In the case at bar, petitioner had a temporal connection between her need for accommodation and her mandated religious observance, yet the Courts decided that it was insufficient to demonstrate a need for religious accommodation.

All these cases demonstrate that different courts and agencies have widely divergent determinations of the breath of religious accommodation in relation to religious practices. It therefore behooves this Court to evaluate the issues involved in accommodation and develop a template that could be used to provide consistent uniform criteria in assessing the contours of religious accommodation.

4. **Do the decisions of the lower Courts wherein the Courts made significant erroneous determinations about the validity of Petitioner's religious practices (which this Court has cautioned not to do), represent sufficient error to justify vacating the decisions of the Courts on the merits of the case?**

In *Thomas vs. Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981), the Court very clearly stated that "courts are not arbiters of scriptural interpretation" and in *Fowler vs. Rhode Island,* 345 U.S. 67 (1953) the Court stated "it is no business of the Court to

say . . . what is a religious practice or activity?" This was also expressed in *Cooper v. General,* 533 F.2d 163 (5th Cir. 1976) which explained that federal courts are powerless to evaluate the logic or validity of religious beliefs which are sincerely held. Also see *Abramson v. William Paterson College of New Jersey,* No. 00-5026 (3rd Cir. 2001). Yet in the case at bar, the Courts not only determined the validity of petitioner's beliefs but did so very erroneously and based their decision to grant judgment in favor of the defendant on that very erroneous and inappropriate determination. Petitioner therefore respectfully requests that the case be reviewed on its merits and remanded to the district court.

CONCLUSION

Religious accommodation is a complex area of law, which has given rise to a multitude of disparate and inconsistent opinions. Granting of certiorari is therefore warranted to address the issues of accommodation that are not directly related to Sabbath work and to develop a concise algorithm to provide for equitable and effective accommodation of religious observances which are a fundamental right.

Respectfully submitted,

S. Rebecca Dachman
P.O.B. 3370
Silver Spring, MD 20918
301-526-2453

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

S. REBECCA DACHMAN, *Plaintiff-Appellant,* v. DONNA E. SHALALA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Defendant-Appellee,* and KAREN D. WEISS, *Party in Interest,* MARGARET MITRANE, M.D., *Movant.*	No. 00-1641

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, District Judge.
(CA-96-873-AMD)

Argued: April 6, 2001

Decided: May 18, 2001

Before WIDENER and WILKINS, Circuit Judges, and Patrick Michael DUFFY, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished opinion, Judge Duffy wrote the opinion, in which Judge Widener and Judge Wilkins joined.

COUNSEL

ARGUED: Richard Lee Swick, SWICK & SHAPIRO, P.C., Washington, D.C., for Appellant. Jennifer Lilore Huesman, Assistant United States Attorney, Baltimore, Maryland, for Appellee. **ON BRIEF**: Lynne A. Battaglia, United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

DUFFY, District Judge:

This case is before the court on appellant's claim that the district court erred in granting appellee's motion for summary judgment. Because we conclude that appellant failed to establish any Title VII violation, we affirm.

I.

Appellant Dr. Rebecca Dachman is an Orthodox Jew. Beginning in 1988 appellant worked as a physician with the Center for Biologics Evaluation and Research ("CBER"), a department of the United States Food and Drug Administration ("FDA"). At issue in this case are

adverse employment actions taken against appellant by her supervisors beginning in January 1995.[1]

Although appellant claimed that she was an exemplary employee, appellant was suspended on January 21, 1995, for fourteen days without pay. Appellant's supervisor stated that she was suspended because of insubordinate, disrespectful, and disruptive behavior. After her suspension, appellant was detailed for a period of ninety days to the Division of Biostatistics and Epidemiology, where appellant claimed that she was given only administrative work. At the end of her ninety day detail, appellant was permanently reassigned to the Oncology Department. Appellant claimed that after her reassignment she was given only Phase I work as opposed to the more difficult Phase II work that she had been entrusted with prior to her administrative leave.

Appellant was suspended again from October 25, 1995, to November 7, 1995. Her supervisor stated that the suspension was a result of appellant's unacceptable behavior at a meeting and her failure to follow supervisory instructions.

Effective November 17, 1995, appellant was put on leave restriction due to her poor attendance and irregular

---

[1] The allegedly discriminatory acts occurring prior to January 1995 are time barred because appellant failed to exhaust her administrative remedies as required by law. *See* 29 C.F.R. § 1614.105(a)(1) (2000). Further, these acts are not part of a continuing violation because, as will be shown, appellant has not established even one claim of discrimination and/or retaliation that was timely filed. *See Woodard v. Lehman*, 717 F.2d 909, 915 (4th Cir. 1983).

leave use. On September 29, 1997, appellant was placed on administrative leave without pay, and on February 8, 1998, she was terminated. Appellant argued that these adverse employment actions were either (1) discriminatory on the basis of her religion or (2) in retaliation for her filing of a discrimination claim with the Equal Employment Office.

II.

To establish a prima facie case of discrimination,[2] appellant must (1) show that she was part of a protected group, (2) show that she was performing her job satisfactorily, and (3) provide " 'indirect evidence whose cumulative probative force supports a reasonable inference that [the] [adverse employment action] was discriminatory.' " *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1017 (4th Cir. 1996) (quoting *Lawrence v. Mars, Inc.*, 955 F.2d 902, 905-06 (4th Cir. 1992)) (first alteration in original). Appellant's inferential case "might consist of evidence that the employer treated the employee more harshly than other employees of a different religion, or no religion, who had engaged in similar conduct." *Chalmers*, 101 F.3d at 1017.

In this case, appellant has not established a prima facie case of religious discrimination. First, the record indicated that appellant was not performing her job satisfactorily. Appellant received several suspensions, and her

---

[2] Appellant does not have direct evidence of discrimination and therefore must use the *McDonnell Douglas* framework to establish her claim of religious discrimination and/or retaliation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

supervisors provided detailed memoranda documenting her unsatisfactory behavior. (JA 249-59, 261-79, 329-33). Further, the record was replete with other documented complaints made by her supervisors, (JA 233, 237-38, 287-88, 292, 311-12, 324-28), including a memorandum from the Deputy Director of CBER that stated:

> I have found no mitigating circumstances which justify your blatant disobedience and insolent, disruptive behavior. On the other hand, I find numerous aggravating circumstances which warrant your suspension from duty for your misconduct. . . . *This Agency cannot allow your misconduct to continue, and I must warn you, again, that you are in jeopardy of losing your position with the FDA if you do not take appropriate actions immediately to modify your conduct to an acceptable level.*

(JA 348) (emphasis added).

Second, the cumulative force of appellant's evidence does not create an inference of religious discrimination. Appellant has not provided any evidence that she was treated differently from any other employee who had similar disciplinary and work-related problems. *See DeJarnette v. Corning Inc.*, 133 F.3d 293, 298 (4th Cir. 1998). Further, her relationship with her supervisors started out collegial and only deteriorated over time – even though her supervisors would have known from the beginning that appellant was an Orthodox Jew.[3] (JA 42-43).

---

[3] Significantly, appellant listed a number of personal, rather than discriminatory or retaliatory, reasons why her relationship with her colleagues and supervisors deteriorated. (JA 37, 40-41, 43).

Even if appellant could establish a prima facie case of discrimination, however, appellee has articulated legitimate, non-discriminatory reasons for the FDA's actions, and appellant has not shown that these reasons were false and a pretext for discrimination.[4] First, appellant's supervisors minutely detailed the reasons for her two suspensions, including appellant's refusal to write an apology letter when asked to do so by her supervisor, her refusal to leave her supervisor's office when ordered to do so, and her continual nagging.[5] (JA 249-56, 26-79, 329-33). Notably, although attempting to justify her behavior, appellant conceded that she engaged in this behavior. (JA 95, 97-99).

Second, appellant's supervisor stated that appellant was reassigned because the situation for both appellant and her supervisors had become intolerable. (JA 286-87). Appellant herself noted the tension in her department

---

[4] Appellant argued that the district court erred in not applying the law as set forth in *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 147-49 (2000). However, even assuming appellant established a prima facie case of discrimination, the *Reeves* analysis is inapplicable because appellant has not provided any evidence that appellee's legitimate, non-discriminatory reasons were false.

[5] A. I was just in his room nagging him.

Q. And was he your supervisor at the time?

A. Yes.

Q. And was that appropriate behavior for a subordinate to nag a supervisor?

A. It's behavior that I always exhibited.

(JA at 95).

and stated that it would be better if she were moved to another department.[6] (JA 54, 286-87).

Third, the record overwhelmingly supported appellee's claim that appellant was placed on leave restriction because of her poor attendance record and inappropriate leave use. (JA 292, 312). Dr. Keegan, chief of the Oncology Department, wrote appellant a memorandum detailing the many problems with her attendance and leave use. (JA 357-63). This memorandum stated that appellant's work records did not account for eight and a half hours of work on many days and that for one pay period there were only four days that appellant worked a full day without taking some sort of leave. (JA 357-58). Once again, appellant did not present any evidence that this legitimate, non-discriminatory reason was false.

Finally, appellant's supervisor provided ample justification for appellant's termination. The grounds for her termination included (1) repeated failure to follow supervisory instructions, (2) repeated unauthorized absences, (3) unacceptable conduct, and (4) misuse of government equipment. (JA 726-89). In an extensive memorandum, Dr. Keegan enumerated page after page of leave and attendance violations that directly conflicted with the explicit requirements she had set out for appellant in a previous memorandum. (JA 726-71). Appellant did not

---

[6] Appellant also complained that she was not given enough work in her new department. However, the record showed that appellant's new position afforded her sufficient work. (JA 192, 386).

present any facts showing that the copious documentation of leave and attendance abuse was false.[7] Although appellant complained that she was monitored more closely than other employees, she did not present any evidence that she was treated differently from any other employee that engaged in gross abuse of attendance and leave requirements.[8]

III.

Appellant's retaliation claim is based on the same acts enumerated above and fails for the same reasons. In order to support a claim for retaliation, appellant must show: (1) that she engaged in protected activity; (2) that her employer took adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action. *See Lawrence v. Mars, Inc.*, 955 F.2d 902, 906 (4th Cir. 1992).

---

[7] Further, the record is clear that appellant's attendance and leave problems did not result from her need to take time off to observe her religious holidays. Instead, her leave and attendance problems stemmed from her refusal to ask for leave in a timely manner, her refusal to sign in and out, and her habit of leaving her office for extensive periods of time without informing anyone of her whereabouts, even after explicit instructions to remain in her office. (JA 726-89).

[8] Further, Dr. Keegan noted appellant's refusal to return government documents, including confidential documents, after ordered to do so. (JA 751-52). Dr. Keegan also documented appellant's refusal to provide an accounting of her work. (JA 752-53). Appellant did not provide any evidence that these reasons were false.

In this case, appellant claims that she engaged in protected activity by filing a claim of discrimination with the Equal Employment Office and that as a result of this claim everyone in the FDA began taking retaliatory actions against her. (JA 125). This court has found that establishing a causal connection between the filing of a claim and retaliatory action is not an onerous burden to meet. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). However, even if appellant established a prima facie case of retaliation, as fully detailed above, appellee provided legitimate, non-discriminatory reasons for the FDA's actions, and appellant has failed to show that these reasons were pretextual.

IV.

Appellant also claims that appellee violated Title VII by failing to accommodate her religious practices. There is no dispute that appellant's religious beliefs prohibited her from working after sundown on Fridays and on religious holidays. However, appellant has not provided any evidence that the FDA's attendance policies required her to work during these times. Therefore, as a matter of law, she cannot establish a prima facie case of religious discrimination.

Title VII of the Civil Rights Act of 1964 requires an employer to make reasonable accommodations for its employees' religious observances. In relevant part, the act states:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he

> is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j) (2000). To establish a prima facie case of discrimination, an employee must establish that: " '(1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; [and] (3) he or she was disciplined for failure to comply with the conflicting employment requirement.' " *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996) (quoting *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985)).

All parties agree that appellant was given at least two hours leave every Friday.[9] Appellant stated that the two hour leave did not give her sufficient time to pick up Challah bread from a Jewish store.[10] However, appellant admitted that the Jewish store began making the bread on Thursday morning. Appellant stated that the store was open until 8:30 p.m. on Thursdays, and she stated that she had on occasion gone shopping on Thursday night. (JA 655-57). When asked why she could not pick up the bread on Thursday night, appellant responded:

> [The children] are starving. They want to eat and they want to do homework. They don't

---

[9] The two hour Religious Compensation Time allowed appellant to leave work at 1:30 p.m. on Fridays. (JA 590-91).

[10] The district court found that the Challah bread was not required for the Sabbath. (JA 718). However, in the light most favorable to appellant, the bread was a very important part of the Sabbath meal, and it was important to buy this bread from a Jewish grocer. (JA 652, 658-59).

> want to leave the house. They're very conservative. They don't want to leave the house after they get home in the evening. They get very upset when I say I want to go somewhere.

(JA 665-66).

While an employer has a duty to accommodate an employee's religious beliefs, the employer does not have a duty to accommodate an employee's preferences. *See Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682 (9th Cir. 1998) ("Title VII does not protect secular preferences."). In this case, appellant's own testimony confirmed that her decision to pick up the bread on Friday afternoon was simply her preference and not a religious requirement. As such, her employer did not have a duty to accommodate this preference.

Appellant also argued that the court did not take into account the many other activities that she had to complete before sundown Friday. She stated that "during Friday afternoons she need[ed] to cook any food which would be consumed in the ensuing period, bathe her children, lay out clothes for the next day, and prepare her home by selecting which appliances [would] be kept hooked up to the electricity." (Appellant's Brief at 32). However, while her religious beliefs prohibited her from working on the Sabbath, her religious beliefs did not mandate that all preparation for the Sabbath take place on Friday. While some tasks, such as bathing the children, would have to be done on Friday, other tasks, such as preparing meals and cleaning the house, could be done

earlier in the week.[11] Once again, the employer does not have an obligation to accommodate appellant's preferences, only her actual religious beliefs and practices.

V.

Finally, appellant argues that summary judgment was untimely because she did not have an opportunity to depose her supervisors concerning her termination. Decisions of a trial court as to discovery issues are reviewed for abuse of discretion. *See Strag v. Board of Trustees*, 55 F.3d 943, 953 (4th Cir. 1995). The court may deny or continue a motion for summary judgment "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition. . . . " Fed. R. Civ. P. 56(f). A party opposing summary judgment based on this rule is required to file an affidavit "specifying which aspects of discovery required more time to complete." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995).

Appellant filed an affidavit stating that she needed to depose her supervisors concerning her termination because "[t]heir depositions may provide critical information regarding motives, facts and disputes of fact." (JA 986). However, as appellant could not produce any evidence to refute her supervisor's detailed explanation for

---

[11] Appellant admitted that she could do some cooking during the Sabbath but stated that she "prefer[red] to do [her] cooking beforehand, because it's just very difficult. The food never comes out as good." (JA 25).

her termination, the district court did not abuse its discretion when it did not allow additional discovery.

VI.

In conclusion, in light of the overwhelming evidence presented by appellee justifying the FDA's employment actions against appellant, we hold that appellant failed to establish any Title VII violation.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN, Plaintiff	:	CIVIL NO. AMD 96-873
v.	:	(Filed Apr. 13, 1999)
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant	:	

MEMORANDUM

Plaintiff, Sarah Rebecca Dachman, M.D., an Orthodox Jew and a former employee of the Food and Drug Administration ("FDA"), an agency of the Department of Health & Human Services, instituted this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"). Her claims include one or more of the following theories: sex discrimination, race discrimination, religious discrimination, retaliation and hostile environment.[1] As redress, Dr. Dachman seeks declaratory, injunctive and various forms of corrective relief and damages.

---

[1] Dr. Dachman was represented by counsel throughout the administrative processing of her claims and up until the conclusion of discovery in these proceedings. She is presently unrepresented, however, having discharged her counsel after the pending motions were filed.

In this memorandum, I shall address all claims except plaintiff's termination claims. Plaintiff essentially alleges that her supervisors at the FDA discriminated against her on the basis of sex, race and religion, took retaliatory actions against her, and intentionally created an abusive and hostile work environment in violation of Title VII over the four year period culminating in her termination in early 1998. I have carefully considered the parties' submissions and conclude that no hearing is necessary. Local Rule 105.6 (1997). For the reasons stated below, I shall grant defendant's motion for summary judgment.[2]

---

[2] Prior to filing the lawsuit, Dr. Dachman had filed three EEO administrative complaints alleging discrimination and retaliation on February 24, 1995, September 12, 1995, and February 28, 1996. She filed her complaint in this court on March 22, 1996. Defendant filed her answer on June 3, 1996. The parties engaged in six months of discovery and there arose several disputes over discovery. *See Dachman v. Shalala*, 950 F.Supp. 708 (D.Md. 1997).

On January 24, 1997, defendant filed a so called "partial motion to dismiss." On March 10, 1997, I granted plaintiff leave to file a first amended complaint, to which defendant filed an answer on March 19, 1997. On July 7, 1997, after repeated skirmishes over discovery issues, defendant filed her motion for summary judgment. On July 24, 1997, plaintiff filed a consolidated response in opposition to the defendant's "partial motion to dismiss" and motion for summary. These papers are the objects of the court's attention in this memorandum opinion.

In September 1997, while the dispositive motions were pending, plaintiff filed a motion for leave to file a second amended complaint to add claims which allegedly had matured during the pendency of the action in this court. Around this time, it was clear that plaintiff would file at least one additional administrative complaint because she had been placed on

I. UNDISPUTED FACTS OR FACTS IN LIGHT MOST FAVORABLE TO PLAINTIFF

A. Introduction

I present here a full factual account of the evidence and information contained in the record. For purposes of ruling on the motions, plaintiff is entitled to have "her version of matters in dispute accepted, and the benefit of all favorable inferences," *Fisher v. Maryland Dept. of Housing Community Dev.*, 32 F.Supp.2d 257, 262 (D.Md. 1998), at least so long as there is proper support in the record under Fed.R.Civ.P. 56 for her version of events.

---

suspension pending termination. (In fact, plaintiff filed several administrative complaints with the EEO office after September 1997.). On October 14, 1997, in the interest of judicial economy, I denied without prejudice defendant's "partial motion to dismiss" and motion for summary judgment and plaintiff's motion for leave to file a second amended complaint, with an eye to having plaintiff's looming termination claim joined in this action once that claim had been properly exhausted. In early 1998, Dr. Dachman obtained substitute counsel and then, shortly thereafter, discharged her attorneys altogether.

On July 6, 1998, after Dr. Dachman had discharged her counsel, I was advised that plaintiff had exhausted her administrative remedies in respect to the termination claims. Subsequently, I have attempted, but have been largely unsuccessful in those attempts, to get plaintiff to assert her termination claims in a cogent fashion so that the case can be adjudicated in an orderly way. Relatedly, plaintiff has persisted in her efforts to get voice exemplars and telephone records from one of her co-workers for reasons mentioned *infra*, note 3, and also to convince the court to require defendant to produce computer records of e-mail. I decline to do so.

Plaintiff's termination claims will be addressed at a later time.

Dr. Dachman graduated with honors from the George Washington University School of Medicine in 1983. She became employed by the FDA in 1988. Initially, she worked part-time and later she became a full-time employee.

Dr. Dachman worked as a medical officer at the Center for Biologics Evaluation and Research ("CBER"), where she was responsible for reviewing drug licensing applications, investigational new drug applications and responding to inquiries regarding such applications. Up until at least 1995, Dr. Dachman's job performance evaluations reflected that her performance was "fully successful" to "excellent."

Dr. Dachman began her career at the FDA with a core group of other medical officers. This core group included, but was not limited to, Dr. William Schwieterman, Dr. Margaret Mitrane, Dr. Patricia Keegan and Dr. Karen Weiss. From time to time during the events at issue in this case, Drs. Weiss, Schwieterman and Keegan, respectively, were Dr. Dachman's first level supervisors. Dr. Jay Siegel was her second level supervisor. Dr. Weiss and Dr. Siegel adhere to the teachings of Reform Judaism and Conservative Judaism, respectively.

Dr. Dachman had a collegial relationship with her colleagues when she first began working at the FDA. However, the nature of her relationship with her colleagues eventually deteriorated into rancor and strife. Dr. Dachman eventually filed innumerable charges of discrimination against her supervisors with the Equal Employment Opportunity ("EEO") office. Dr. Dachman blames her supervisors and co-workers for the failure of

the collegial relationship she had with them. Defendant Shalala contends, however, that Dr. Dachman's unprofessional and inappropriate workplace behavior and poor job performance were the major factors that contributed to the disintegration of the relationship and ultimately led to her termination from employment at the FDA. In any event, the record reflects that the relationship began to sour in 1993 and, on February 6, 1998, Dr. Dachman was discharged from her position at the FDA.

Through Dr. Dachman's eyes, there were two major events that culminated in her discharge from employment with the FDA. First, she believes that her protests to Dr. Siegel that his sexual advances towards her were unwelcomed caused him to turn against her. Second, she believes that Dr. Schwieterman acted deliberately to have her arrested for allegedly leaving a threatening message on his office voice mail. (Dr. Dachman also contends, alternatively, that the threatening voice mail message was actually left by one of her co-workers who mimicked Dr. Dachman's distinct accent.). As for Dr. Schwieterman, Dr. Dachman has come to believe that his motives were based on an aversion to her religious beliefs. Dr. Dachman further believes that her supervisors and coworkers, with discriminatory animus, conspired to discredit her professionally and to have her removed from her job.

B. Evidence of Unwelcomed Sexual Conduct by Dr. Siegel

In 1990, Dr. Dachman became the key medical reviewer of a clinical trial application to study a drug that dissolves cardiac blood clots. The project was dubbed

"GUSTO." It was the largest such project that had been submitted to CBER. In October 1993, an amendment to the license application was submitted, and Dr. Dachman was appointed chair of the "GUSTO" Product License Application ("PLA") advisory committee. In addition, she became the lead reviewer of the trial data.

On occasion, Drs. Dachman and Siegel worked together closely. Dr. Dachman asserts that beginning in early 1993, Dr. Siegel began touching her on the forearm, always on or near the same spot. Dr. Dachman estimates that between early 1993 and April 1994, Dr. Siegel touched her forearm approximately ten times. Although Dr. Dachman felt uncomfortable with this contact, she did not voice any objection to the touching because she did not know Dr. Siegel's motivation. In May 1994, however, Dr. Dachman began to suspect that Dr. Siegel's motives were sexual in nature and she asked him to stop touching her. Her suspicions about his motives derived from her observation that he never touched her when he was angry with her. Dr. Dachman told him that it bothered her when he touched her because, as an Orthodox Jew, she is not accustomed to casual contact with men. Dr. Dachman testified that Dr. Siegel touched her only three times after she confronted him about his behavior.

Dr. Siegel does not deny that he touched Dr. Dachman on the forearm on numerous occasions. He testified, however, that he was only trying get her attention and to point out something that they were reviewing. He testified that despite his efforts to respect Dr. Dachman's wishes, she had to remind him on occasion.

One stormy evening in May 1994, Drs. Siegel and Dachman were working in his office on the GUSTO project. Dr. Dachman testified that without warning, Dr. Siegel turned off the lights. Dr. Dachman feared that Dr. Siegel was going to sexually attack her. Immediately, she shouted "Jay, what the hell are you doing? I'm a married woman!" Dr. Siegel responded immediately and turned the lights back on. He explained to Dr. Dachman that he had only wanted to look at the lightning. Afterwards, Dr. Dachman asked Dr. Siegel to keep the door open while they worked and Dr. Siegel complied with her wishes.

So far as the record discloses, these allegations comprise the entirety of Dr. Dachman's evidence of unwelcomed sexual behavior by Dr. Siegel.

C. Dr. Dachman is Forced to Take Administrative Leave

As chair of the GUSTO PLA committee, Dr. Dachman was responsible for coordinating tasks related to the project. Other committee members were assigned specific roles and tasks. On one occasion in July 1994, Dr. Dachman's colleague, Dr. Glen Jones, was responsible for circulating documents to the PLA committee. Dr. Dachman testified that because Dr. Jones had previously failed to follow her instructions about circulating documents, she decided to handle the job herself. On July 11, 1994, Dr. Dachman circulated the documents without first notifying Dr. Jones that she was going to handle the task. Dr. Dachman's actions in assuming Dr. Jones's role caused confusion among the committee, and so displeased Dr. Jones that he complained to Dr. Dachman's immediate

supervisor, who was by then Dr. Schwieterman. Dr. Schwieterman instructed Dr. Dachman to apologize to Dr. Jones through the electronic mail system and to copy other members of the committee. Initially, Dr. Dachman agreed to apologize as instructed, but she soon changed her mind. She decided that it would be humiliating to make a public apology and that to do so would have the effect of diminishing her role as chair of the committee. Instead of sending an apology by electronic mail, Dr. Dachman apologized to Dr. Jones privately and in person.

On July 13, 1994, Dr. Dachman went to Dr. Schwieterman's office to explain why she should not have to apologize to Dr. Jones by electronic mail. At this meeting, there was great tension between Drs. Schwieterman and Dachman. In due course, Dr. Schwieterman told Dr. Dachman that he did not wish to discuss the matter any further and he asked her to leave his office. Dr. Dachman refused to leave. She insisted on continuing the discussion. Again, Dr. Schwieterman asked her to leave his office and advised her that if she did not leave he would be forced to call security. Still, Dr. Dachman refused to leave. Dr. Schwieterman called security and departed his office, followed by Dr. Dachman. On deposition, Dr. Schwieterman testified that when Dr. Dachman refused to leave his office, he felt isolated and became frightened. He testified that his fear stemmed from his knowledge of an incident in 1993 in which Dr. Dachman had became angry in the workplace and damaged property. Shortly after the first incident, Dr. Dachman returned to Dr. Schwieterman's office and security was again summoned. Dr. Dachman later wrote a lengthy apology/explanation to Dr. Schwieterman.

Dr. Dachman does not deny that Dr. Schwieterman had to call security before she was willing to leave his office. She justifies her refusals to leave on grounds that she was only following Dr. Siegel's instructions to be persistent in her dealings with Dr. Schwieterman. She had received a letter from Dr. Siegel at the time Dr. Schwieterman became her immediate supervisor. (The letter alluded to earlier difficulties with Dr. Dachman's work performance and her resistance to close supervision.). Dr. Siegel had admonished her to seek and accept the supervision of Dr. Schwieterman. Specifically, the letter stated: "You should accept his suggestions and directions unless you persuade him otherwise." It is clear in the record that Dr. Dachman has seized on this directive, which was manifestly intended to curb her insouciance toward supervision, as a license to her to behave in utterly inappropriate and unprofessional ways.

Thus, Dr. Dachman testified that when she visited Dr. Schwieterman on the evening of July 13, 1994, she was only trying to *persuade* him that it was not necessary for her to offer a public apology to Dr. Jones. She admits, however, that she was "nagging" him. On deposition, Dr. Dachman testified as follows:

A: I was just in his room nagging him.

Q: And was he your supervisor at the time?

A: Yes.

Q: And was that appropriate behavior for a subordinate to nag a supervisor?

A: It's behavior that I always exhibited.

* * *

Q: What other choice did Dr. Schwieterman have but to call security to get you to leave his office?

A: He could have sat down and asked me what's really bothering me.

* * *

Q: Assuming that the security guard had not come, would you have left his office?

A: Yeah, if he would have sat down, if he would have calmed down.

Q: Under your conditions?

A: No. If he would have been calm and said, "Listen, why don't we all sleep on it tonight, and tomorrow we'll talk about it," I would have left.

Q: Do you believe that your refusal to leave one of your superiors' office after a request to do so is insubordinate conduct?

A: No.

* * *

Q: I think to be insubordinate in my world or in my definition, you would refuse to follow a legitimate order. I didn't think what he was asking me to do was legitimate. I didn't feel that writing that apology was legitimate, and refusing to talk to me was also not legitimate.

Dachman Dep. at 340-44.

Dr. Dachman testified that she often nagged her supervisors and had on several occasions refused to leave

their offices when asked to do so. She views her conduct as symptomatic of a tenacious pursuit of the truth and a desire to maintain public safety with regard to the evaluation of drugs. Dr. Dachman testified that it was her practice to "argue points that were correct and for the public benefit that others might have dropped."

Dr. Dachman's attitude toward the proper role and behavior of subordinates is further evidenced by her testimony regarding an occasion when she asked Dr. Siegel for assistance in designing an audit for the GUSTO project. She testified that he refused to meet with her to design a plan, so she began following him around the work place. She also testified that she would appear at his office unannounced hoping that he would help her. Dr. Dachman testified that even after he would insist that she leave his office, she would refuse to do so until he had answered her questions or until after she had argued her point to resolution. It is evident from the record that Dr. Dachman's supervisors did not share her view that her actions were mere instances of dogged but commendable persistence in truth-seeking or problem-solving.

D. Dr. Dachman is Suspected of Criminal Behavior

Two days after the ugly confrontations with Dr. Schwieterman in the latter's office regarding the need to apologize to Dr. Jones, an event occurred that triggered the turmoil that is the focus of this case. The event completely altered Dr. Dachman's personal and professional life. On the afternoon of July 15, 1994, Dr. Schwieterman retrieved a threatening message from his office voice mail. After listening to the message several times,

he reached the conclusion that the messenger was Dr. Dachman because it sounded like her. The message was: "Hi, I'm going to haunt you. Be afraid, I'm at your house, so be afraid. You [sic] will kill you." Def.'s Mem. Supp. Mot. S. J., Ex. 13 at 2.

To determine how to handle the matter, Dr. Schwieterman first contacted his supervisor, Dr. Weiss who, in turn contacted her supervisor, Dr. Siegel, for advice. When Dr. Schwieterman played the recorded message for Drs. Siegel and Weiss, they also believed that the voice could have been that of Dr. Dachman, but they were less certain.

Eventually, Dr. Schwieterman contacted Nancy Webber, the head of FDA security. She testified that she advised Dr. Schwieterman to contact the Montgomery County Police Department because the threat was personal. She also testified that she advised him to contact the agency's Internal Affairs office, but only after he informed her that he believed another government employee made the threat.

Officer Matney of the Montgomery County Police Department arrived at the work site to take a report from Dr. Schwieterman. Dr. Schwieterman told Officer Matney that he believed Dr. Dachman left the threatening message for him and that he took it seriously. He also informed Officer Matney of his altercations with Dr. Dachman on July 13, 1994, and the need to summon security officers. Manifestly, Dr. Schwieterman believed that the events of July 13, 1994, led Dr. Dachman to leave the threatening message. Officer Matney suggested that Dr. Schwieterman file a criminal complaint against Dr.

Dachman with the Montgomery County Maryland District Court Commissioner (a Montgomery County ordinance prohibited telephone threats).

Subsequent to his meeting with Officer Matney, Dr. Schwieterman informed Dr. Weiss of his election to file a sworn complaint with the commissioner. With Dr. Weiss's permission, Dr. Schwieterman left work on July 18, 1994, to file a criminal complaint against Dr. Dachman. As a result of the complaint filed by Dr. Schwieterman, the court commissioner issued an arrest warrant for Dr. Dachman.

According to Dr. Dachman, she learned about the warrant from Officer Matney after she was lured unwittingly into a meeting with him on July 18, 1994. She testified that both Drs. Siegel and Schwieterman advised her to report for a 3:00 p.m. meeting that day. When she asked Dr. Siegel what the meeting was about, he refused to tell her. True to form, Dr. Dachman resorted to "nagging" Dr. Siegel to get him to tell her the purpose of the meeting. She followed him to lunch, outside of the building and down the street, repeatedly asking him to tell her what the meeting was about. Dr. Dachman contends that her supervisors were secretive about the subject of the meeting because they did not want her to know that she was going to be interrogated by a police officer. Indeed, she was questioned by Officer Matney about the threatening message. She believes that she was unnecessarily interrogated by Officer Matney, and she complains that he did not advise her of her rights. She infers (but lacks even a scintilla of evidence to support the inference) that her supervisors' cooperation in arranging her surprise interview by the police in connection with the threatening

message constitutes evidence of their prohibited animus toward her.

At the meeting, Dr. Dachman explained to Officer Matney that she was being framed by a colleague, that she had not left the threatening message and that he would see the truth if only he would conduct a voice analysis of the recorded message.[3] At some point, Dr. Dachman even offered an alibi for her whereabouts at the time the threatening message was made.[4] Joseph Salweski, a colleague at the FDA, prepared a statement for Dr. Dachman's defense in the criminal case indicating that it was more probable than not that he was in a

---

[3] Dr. Dachman has charged throughout this litigation that her colleague, Dr. Margaret Mitrane framed her and that it was Dr. Mitrane who left the threatening message for Dr. Schwieterman. Although I permitted Dr. Dachman to take discovery on this issue, when Dr. Dachman's expert suggested that there was a need to have Dr. Mitrane disguise her voice to enable him to make a legitimate analysis, I cut off this line of inquiry. In the final analysis, there has been no factual development in the evidence establishing that plaintiff was framed or that Dr. Mitrane left the threatening message. Relatedly, in parallel litigation removed from state court and adjudicated before Judge Messitte of this court, Dr. Dachman unsuccessfully pursued claims against Dr. Schwieterman. *See Dachman v. United States*, Civil No. PJM 96-1261 (D.Md. Nov. 7, 1996), *aff'd*, 155 F.3d 558, 1998 WL 414057 (4th Cir. Jul 23, 1998) (unreported), *cert. denied sub nom. Dachman v. Schwieterman*, 119 S.Ct. 906 (1999).

[4] Apparently, it could be determined that the call was not made from a telephone on the FDA system but instead, it seems clear that the call was placed from an "external telephone." The record seems not to disclose whether such an "external telephone" could have been a pay telephone on or near the FDA campus.

meeting with Dr. Dachman at the time the threatening call was made. It does not appear, however, that this alibi information was investigated by the police. The Office of Internal Affairs of the FDA did review this information when that office conducted an independent investigation of the threat made to Dr. Schwieterman. Otherwise, there is little information in the record regarding it.

The next day, Dr. Siegel ordered Dr. Dachman to take a week of administrative leave with pay. Dr. Siegel told her that the primary reason for putting her on leave was to avoid a confrontation with Dr. Schwieterman. Dr. Dachman testified that Dr. Siegel told her that he was taking the action because Dr. Schwieterman was afraid of her. The evidence of record also reflects that Dr. Dachman's supervisors had for some time been concerned about her work performance and work habits, but had generally failed to confront her about their concerns. Also, to resolve his ongoing concerns about plaintiff keeping government documents at her home, Dr. Siegel ordered Dr. Dachman to use the paid leave period to gather and return to the agency all government documents that she had taken home.

E. Dr. Dachman is Arrested

While Dr. Dachman was on leave, she was afraid that she would be arrested on the Sabbath. To avoid the humiliation of being arrested at her home on the Sabbath, Dr. Dachman reported to the police station. She was arrested, fingerprinted, photographed, and released on her own recognizance.

Although Dr. Dachman was originally scheduled to return to work on July 25, 1994, Dr. Siegel extended her leave until July 27, 1994. Dr. Siegel testified that he extended the leave period because

> it was important, upon her return to the workplace, to have a very clear plan as to what guidance she would receive in terms of her working relationship, her reporting relationship; what actions she might not be subject to regarding issues such as leave and that rather than have her return in an area where there might be ambiguity and where there had been problems in the past, it was felt that it was best – she was on paid administrative leave during this time, and it was necessary to have a clear picture to present to her of what the expectations of her were in the work environment upon her return.

Def.'s Mot. Summ. J., Ex. 10 at 115.

F. Dr. Dachman is Suspended for her Behavior in July 1994

When Dr. Dachman returned to work, Dr. Siegel removed her as chair of the GUSTO PLA committee and on July 28, 1994, he proposed a 14 day suspension without pay on the ground that Dr. Dachman had exhibited "repeated insubordinate, disrespectful, and disruptive behavior." Dr. Siegel noted the following behavior to support the proposed suspension: (1) failing to leave Dr. Schwieterman's office on July 13, 1994; (2) repeatedly asking him (Dr. Siegel) the purpose of the July 18, 1994, meeting, including interrupting him during a telephone conversation and following him to lunch; (3) failing to

obey instructions not to enter the workplace during her administrative leave; (4) failing to return government documents from her home on July 25, 1994, as instructed; and (5) telephoning him at his home on July 19, 1994, regarding the GUSTO project, even though he had instructed her that she should not call him at home on non-urgent matters.

Dr. Dachman opposed the suspension. On August 30, 1994, plaintiff requested a stay of the proposed suspension pending a decision in the criminal case. She reasoned that since the alleged precipitating event for the proposed suspension was plaintiff's refusal to leave Dr. Schwieterman's office on July 13, 1994, and the criminal case evolved from events of that day, a stay was appropriate. Dr. Kenneth Seamon, Acting Director, Office of Therapeutics Research and Review, denied her request for a stay. In the end, however, Dr. Dachman's suspension was not effected until January 23, 1995, after the criminal case had ended, as set forth below.

Specifically, on December 28, 1994, the Montgomery County state's attorney entered a *nolle prosequi* in Dr. Dachman's case. Despite her earlier request for a stay, Dr. Dachman contends that Dr. Seamon delayed ruling on the proposed suspension until January 1995 because he believed that Dr. Dachman would be found guilty. There is, however, little (if any) evidence in the record from which one could draw the inference that Dr. Seamon delayed the suspension on this ground. It appears from the record that Dr. Seamon carefully considered the situation and made a final decision only after he had evaluated plaintiff's counsel's written and oral submissions (including a 12 page single-spaced letter brief) and other

information gathered from interviews with Drs. Weiss, Schwieterman and Siegel.

G. Dr. Dachman is Detailed to Epidemiology

Immediately upon Dr. Dachman's return from suspension in February 1995, Dr. Seamon detailed her to the Division of Biostatistics and Epidemiology. He had discussed the issue with Drs. Siegel and Weiss. Dr. Seamon testified that he had come to the conclusion that the situation had become intolerable to Dr. Dachman, her supervisors and other employees. He testified further that Dr. Dachman had told him on numerous occasions that it was very difficult for her to work at the office. He believed that the increasing performance problems Dr. Dachman was experiencing, including her failure to follow directions, reporting to work late, and disappearing during work hours, were the result of Dr. Dachman's discomfort and unhappiness at work. Dr. Seamon testified that he believed that the detail to Epidemiology would give everybody some relief. He also believed the detail would be beneficial to the Epidemiology Division because they were working on a project involving cardiac issues and Dr. Dachman had expertise in that area.

Dr. Dachman opposed the detail. She denies ever telling Dr. Seamon that she was uncomfortable or unhappy. She contends that she told Dr. Seamon she was enjoying her job. Dr. Dachman contends that she was assigned to a lesser position in Epidemiology and received a reduction in pay, responsibilities and prestige. There is no evidence in the record other than Dr. Dachman's subjective belief that Dr. Dachman was paid less or

that her responsibilities were reduced or less prestigious. These contentions are based on plaintiff's perception that the Epidemiology position held less prestige than a position in her former unit. The detail covered the period February through May 1995. (It should be noted that Dr. Dachman's supervisors all testified that they had been displeased with her job performance over a long period of time, but none seems to have recorded contemporaneously specific acts of poor performance, malfeasance or insubordination by Dr. Dachman.).

H. Dr. Dachman is Reassigned to Oncology and is Denied a Requested Detail

Following the dismissal of the criminal charges against Dr. Dachman, Dr. Seamon authorized the Office of Internal Affairs to begin its own investigation of the threatening voice mail message. The Internal Affairs investigation was completed on May 18, 1995. The agent in charge was unable to substantiate the charge against Dr. Dachman and the investigation was closed.

On May 27, 1995, following the completion of her detail in Epidemiology, Dr. Dachman requested reinstatement to her former position. The request was denied, and Dr. Dachman's resistance to the reassignment resulted in a further suspension, described below. On June 7, 1995, she was reassigned permanently to the Oncology Branch. Dr. Patricia Keegan, chief of the branch, became Dr. Dachman's immediate supervisor. Drs. Weiss and Siegel remained in the chain of command.

Although Dr. Dachman's pay grade and benefits remained the same, she viewed her reassignment to

Oncology as a demotion and a dead-end for her career. She testified:

> Q: Now, when you were assigned to oncology, it's my understanding that you didn't take a downfall in grade or pay or benefits; correct?
>
> A: No.
>
> Q: Did you take a downfall – did your duties or responsibilities change?
>
> A: As I had previously stated, yes. Prior to being in oncology, I was involved in retrials. Those are the trials at the end to determine whether a drug works. . . . I was also involved in a lot of policy making; okay? I had developed a network of interagency committees that I worked with, and people from other parts of the agency that I dealt with on actual policy and endpoints. And all that ended . . . And now all I do is mostly Phase 1's which is the kind of stuff that somebody does when they're new to the agency.
>
> * * *
>
> Q: [W]hy was there a lack of advancement opportunities?
>
> A: [B]ecause what is unique to the oncology division is that almost everybody employed there – every medical officer is an oncologist by training. Not always in every other division of FDA are there doctors employed, specifically trained for that area. Oncology, it is so. And most of the people who rise into team leadership positions, therefore, have that specific training

because oncology is so – you really have to know the field. . . . And so all almost every team leader is an oncologist. I am, I think, the only medical officer in oncology who is not an oncologist or an immunologist, which deals with transplants, or a nuclear medicine person, which deals with all the imaging that people go through when they're being tested for cancer.

* * *

A: I am a qualified physician, but I'm not trained for oncology. And because I'm not trained as an oncologist, they would never allow me to be a leader. And basically, when I came in, Pat's first reaction was she didn't know what she was going to do with me.

Dr. Dachman asserts that Dr. Keegan, on deposition, admitted that there was no promotion potential for her in Oncology. Dr. Dachman presents a skewed interpretation of Dr. Keegan's testimony. Dr. Keegan testified as follows:

Q: How did you see Dr. Dachman's future in Oncology, since she's not an oncologist?

A: Could you clarify the future?

Q: Advancement.

A: Advancement to my job. . . . That's basically the next level up. . . .

Q: Okay. What about – well, how about your job? What's her likelihood of getting your job?

A: At the moment? I'm not leaving, so –

> Q: Assume you get a promotion . . . [w]ould you recommend her for your job?
>
> A: Not at the moment. . . . Because she isn't doing the job that she's supposed to be doing right now well, and I don't think she would do my job better.

Pl.'s Consol. Opp., Ex. 27 at 70-71.

Frustrated with what she viewed as a lack of advancement opportunities in Oncology, Dr. Dachman began participating in lunch hour discussions at the Center for Devices and Radiological Health ("CDRH"). Dr. Keegan was unaware of Dr. Dachman's participation in these meetings, but by October 1995, Dr. Dachman had apparently arranged a detail for herself to that unit. Dr. Keegan learned of the arrangement only after Dr. Dachman had asked Dr. Siegel to approve the detail. Dr. Siegel instructed Dr. Dachman to talk to her supervisor, Dr. Keegan. When Dr. Dachman refused to share information about the detail with Dr. Keegan, Dr. Keegan turned to her supervisor, Dr. Weiss, to intervene. Dr. Weiss contacted Dr. Wolfe Saperstein, Deputy of Cardiovascular Devices for CDRH, to discuss the proposed detail.

Apparently, Dr. Saperstein expressed his delight at the prospect of having Dr. Dachman detailed to his unit. Nevertheless, following her discussion with Dr. Saperstein, Dr. Weiss denied Dr. Dachman's request for a detail to CDRH. Dr. Weiss told Dr. Dachman that she was denying the detail because there was little possibility of a permanent assignment or promotion potential for Dr. Dachman with that unit. In addition, Dr. Weiss said she did not consider a part-time (i.e., Tuesday through Thursday) detail of Dr. Dachman to be in the best interest of the

Oncology Branch. Dr. Dachman contends that Dr. Weiss's reasons for denying the detail are not legitimate because she had been assigned very little work in Oncology. Dr. Dachman also contends (without support in the record) that there may have been potential for a permanent position and promotion at CDRH.

I. Dr. Dachman is Suspended from October 25, 1995 through November 7, 1995

From October 25, 1995 to November 7, 1995, Dr. Dachman was on suspension imposed by Dr. Seamon. Dr. Seamon testified that he suspended Dr. Dachman for failing to follow supervisory instructions and for unacceptable conduct.

The suspension had been proposed earlier, following a meeting Dr. Seamon had with Dr. Dachman following her return from the earlier suspension. Cindy Lepson from Personnel attended that meeting. The meeting was originally scheduled to take place on May 31, 1995, but at plaintiff's request the meeting was rescheduled for June 7, 1995. The purpose of the meeting was to inform Dr. Dachman that she was being reassigned to the Oncology Branch. On the evening of June 6, 1995, Dr. Seamon found a note on his desk from Dr. Dachman setting out her own agenda for the meeting. Also, Dr. Dachman noted that she intended to be represented by counsel at the meeting. Based on advice he received from the Personnel Office, Dr. Seamon left plaintiff a note on the morning of June 7, 1995, explaining that there would not be enough time to cover the items on her proposed agenda and informing

her that she was not entitled to have counsel at the meeting.

Dr. Seamon had allotted only a half hour for the meeting. Dr. Dachman reported 20 minutes late to the meeting, and she was accompanied by counsel. Dr. Seamon refused Dr. Dachman's request to allow her counsel to sit in on the meeting.

On June 28, 1995, Dr. Seamon proposed that Dr. Dachman be suspended on grounds that she had exhibited insubordinate and unacceptable conduct in connection with the June 7, 1995, meeting. He charged that Dr. Dachman was insubordinate because she disobeyed his order not to bring counsel to the meeting. She was charged with unacceptable conduct on the basis that she repeatedly interrupted Dr. Seamon during the course of the meeting, raised her voice, and became agitated.

On July 31, 1995, Dr. Dachman's counsel responded on her behalf to Dr. Seamon's notice of proposed suspension. Dr. Dachman responded that she was not insubordinate because "Dr. Seamon was not entitled to have his order obeyed [because] [t]he law does *not* deny counsel at such meeting[s]." Def.'s Mot. Summ. J., Ex. 28, at 178. She asserted that she had received information from the FDA's legal counsel that she was entitled to have counsel present at the meeting. In deciding to suspend Dr. Dachman, Dr. Seamon stated in the suspension letter that he gave her the benefit of the doubt regarding her view that counsel could be present, and that ground was not sustained as a basis for disciplinary action.

J. Dr. Dachman is Placed on Leave Restriction

Dr. Keegan placed Dr. Dachman on leave restriction beginning on November 17, 1995. In the leave restriction memorandum to Dr. Dachman, Dr. Keegan indicated that she was imposing the restrictions due to her concerns regarding Dr. Dachman's poor attendance and leave use. Dr. Keegan attests that from the outset of her supervision of the plaintiff, she had concerns regarding plaintiff's leave requests and attendance:

> I often did not know her whereabouts, she often did not sign in or out when arriving at or leaving work, and she often failed to submit leave slips (SF-71s), as required of all employees. An audit showed that from July 8, 1995 through November 11, 1995, she had a negative balance of annual leave (7.5 hours) and had accrued 216.75 hours of leave without pay due to an insufficient amount of annual leave to cover her absences.

Def.'s Mot. Summ. J., Ex. 29 at 2. Dr. Keegan informed Dr. Dachman of the results of the audit and told her how difficult it was for her (Dr. Keegan) and personnel to keep track of plaintiff's comings and goings. She also told plaintiff that her leave practices were creating a disruption in the office and that she would be placed on leave restriction. Dr. Dachman believes that Dr. Keegan was treating her unfairly. She contends that when she arrived in Oncology there was no policy regarding requesting leave and that she had asked Dr. Keegan on several occasions what procedure to use. Plaintiff asserts that a leave policy was not instituted until October 1995. However, she admits that by June 7, 1995, she had used many

hours of leave because of the numerous proceedings related to her complaints of discrimination.

Dr. Dachman claims that Dr. Keegan imposed the restrictions on her because she is an Orthodox Jew. In a formal complaint filed with the EEO office on February 28, 1996, Dr. Dachman charged that the "restriction constitutes religious discrimination and retaliation against me for filing EEO complaints and opposing discriminatory practices." Specifically, Dr. Dachman was displeased that she was now only allowed to take no more than two hours ("before sundown") as religious compensatory time ("RCT"). She contends that two hours is unreasonable and that Dr. Keegan's imposition of a two hour limit was an arbitrary decision that did not take into consideration the fact that she had to leave early to purchase Challah bread. Plaintiff contends that before Dr. Keegan limited her RCT to two hours, Dr. Keegan had questioned her about the legitimacy of her religious practices. She views the RCT limitation as discrimination because it makes it difficult for her to follow orthodox practices.

Dr. Keegan testified that she worked with the personnel office in setting the amount of RCT plaintiff could take on Fridays. Dr. Keegan said that she "drew on the first conversation I had with Rebecca, where she told me if she could leave by 4:00 p.m. on Fridays, that that should cover it for her RCT and, if she needed to leave earlier, that she would take annual." Dr. Keegan recalls that she decided on a certain number of hours to grant plaintiff because Dr. Dachman failed to submit leave slips in a timely fashion and it made it difficult for her to approve them in time. She testified that "we – Ms. Lepson thought that a more reasonable alternative would simply

be to clarify how much religious compensatory time I would routinely grant." Pl.'s Consol. Opp., Ex. 27 at 123.

Dr. Dachman denies that she had a poor leave record. She says that the leave record Dr. Keegan reported was fabricated to support Dr. Keegan's imposition of leave restrictions. Nonetheless, Dr. Dachman has offered no evidence to support this claim. Nor has she offered evidence demonstrating that Dr. Keegan acted arbitrarily in imposing the leave restriction or actually denied her leave in an improper manner.

K. Dr. Dachman's Performance Evaluation is Changed and Changed Again

By the time Dr. Dachman joined Oncology in mid-1995, the idea that her supervisors were out to destroy her career had become firmly etched in her mind. Circumstances surrounding the preparation of her performance evaluation for the year ending September 1995 only cemented that idea. Initially, Dr. Dachman received an overall rating of "fully successful." When plaintiff reviewed the evaluation she noted that she had been rated only "minimally successful" on the element concerning writing assignments. She said that she signed off on the evaluation and did not complain about the low rating because she was satisfied with the overall rating. She signed off on the evaluation on November 30, 1995. In December 1995, Dr. Keegan changed the overall rating to "marginally successful." Drs. Keegan and Weiss explained that the overall rating was changed because agency guidelines (previously overlooked) prevent an employee from being rated "fully successful" when the

employee receives a low rating on a "critical element." "Writing assignments" was a critical element of Dr. Dachman's job.

Dr. Dachman did not learn about the change until January 18, 1996. She believes that the events involving the change in her rating represent another attempt by her supervisors to destroy her professional reputation and career. Quite correctly, she notes that during the evaluation process, Dr. Keegan sought Dr. Wise's evaluation of plaintiff covering the period of time she served the detail in Epidemiology, February through May 1995. Dr. Dachman suggests that Drs. Keegan and Weiss attempted to force Dr. Wise to rate her poorly to obtain support for the marginal rating. Although there are documents in the record indicating that Drs. Weiss and Keegan were concerned about Dr. Wise's election to compliment plaintiff's abilities in certain areas, there is no evidence that plaintiff's supervisors acted improperly. Contrary to Dr. Dachman's assertion, there is also no evidence indicating that she was penalized. Eventually, in the fall of 1996, the rating was converted back to "fully successful."

L. Dr. Dachman is Charged AWOL

Dr. Dachman complains of two instances of being charged absent without leave by Dr. Keegan. She alleges that on December 29, 1995, and January 26, 1996, Dr. Keegan unlawfully charged her AWOL. The record shows as a matter of law that Dr. Dachman's complaints are unfounded. Dr. Keegan explained that Dr. Dachman was charged AWOL on December 29, 1995, because she left the office for two hours without requesting leave. On

January 26, 1996, Dr. Dachman reported to work late and started forty minutes after the core hours. Dr. Dachman does not deny that she was absent from the office during these times without official approval. She simply contends that she should be excused because on December 29, 1995, she went to the Personnel office to review agency policies and had no work to do and, on January 26, 1996, she was visiting an EEO counselor.

II. SUMMARY JUDGMENT STANDARDS

Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering a motion for summary judgment, the facts, as well as the inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmovant. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). A party moving for summary judgment is entitled to a grant of summary judgment only if no issues of material fact remain for the trier of fact to determine at trial. *Id.* at 587. A fact is material for purposes of summary judgment, if when applied to the substantive law, it affects the outcome of the litigation. *Anderson*, 477 U.S. at 248. "Summary judgment is not appropriate when there is an issue of fact for a jury to determine at trial, which is the case when there is sufficient evidence favoring the non-moving party upon which a jury can return a verdict for that

party." *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991).

A party opposing a properly supported motion for summary judgment bears the burden of establishing the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 248-49. The nonmovant "cannot create a genuine issue of fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). *See O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 545 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 308 (1996). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56] must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Anderson*, 477 U.S. at 252; *Shealy*, 929 F.2d at 1012.

In Title VII cases, courts are often wary of summary judgment motions because a party's intent is often the crucial element in such cases. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 254 n. 8 (1981). Summary judgment is appropriate in such cases, however, where any factual dispute does not rise to the level of a "genuine issue of material fact." *See Boarman v. Sullivan*, 769 F.Supp. 904, 906 (D.Md. 1991) ("traditional precepts of summary judgment may apply, except where the evidence presents a genuine issue of motive"). Summary judgment should also be granted when a party "fails to make a showing sufficient to establish the existence of an essential element to that party's case, on which the party

will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. In the instant case, a careful review of the record establishes that there is no genuine dispute of material fact, and that defendant is entitled to judgment as a matter of law on all of Dr. Dachman's non-termination claims.

III. ANALYSIS

A. Introduction

As a preliminary matter, defendant moved for dismissal on the ground that the majority of Dr. Dachman's allegations of discrimination were not administratively exhausted in a timely fashion. Defendant also argued that other allegations are not cognizable because plaintiff failed altogether to raise these claims prior to the filing of this civil action. In addition, defendant contended that many allegations do not constitute "adverse personnel actions," and therefore, fail to state a cognizable claim under Title VII. Defendant also asserted that on the merits, plaintiff has failed to establish a prima facie case of race, gender, and religious discrimination, retaliation, and harassment/hostile work environment.

B. Exhaustion of Remedies

Prior to seeking relief for Title VII claims in court, a federal employee must timely exhaust all available administrative remedies. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. § 1614.408. A federal employee is required to file an administrative charge with an EEO counselor "within

45 days of the date of the matter alleged to be discriminatory. . . . " 29 C.F.R. § 1614.105(a)(1). In *Zografov v. Veterans Admin. Med. Ctr.*, 779 F.2d 967, 970 (4th Cir. 1985), the Fourth Circuit "held that a federal employee's failure to consult with an EEO counselor within the required time after an alleged act of discrimination, i.e., within 45 days, is grounds for dismissing the employee's Title VII claim in federal court." *Blount v. Shalala*, 32 F.Supp.2d 339, 341 (D.Md. 1999).

The purpose of the administrative filing requirement is to encourage informal resolution of discrimination claims. 29 C.F.R. § 1601.24. Moreover, the administrative charge provides the agency with notice of what it is to investigate and respondents with formal notice of the alleged practices they are called upon to defend. *Id.* § 1601.12; *see also Powers v. Grinnell Corp.*, 915 F.2d 34, 37 (1st Cir. 1990). Following the filing of the initial charge of discrimination, the employee is interviewed by the counselor. Within 15 calendar days following the final interview and receipt of written notice to this effect, the employee must file a formal administrative complaint with the EEO counselor. 29 C.F.R. § 1614.105(d). If informal resolution attempts fail, a plaintiff may then file suit.

A plaintiff's civil complaint in court is limited by the scope of the investigation which could reasonably have been anticipated to have grown out of the administrative charge. *Chisholm v. United States Postal Svc.*, 665 F.2d 482, 491 (4th Cir. 1981); *EEOC v. General Elec. Co.*, 532 F.2d 359, 368-69 (4th Cir. 1976). "Courts may only exercise jurisdiction over claims encompassed within the EEOC charge and claims 'like or related to allegations contained in the charge, or which grow out of such allegations.' " *Riley v.*

Technical and Mgmt. Serv. Corp., 872 F.Supp. 1454, 1459 (D.Md. 1995) (quoting *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge circumvents the EEOC's investigatory and conciliatory role." *Id.* (citation omitted).

"Incidents outside the statutory window are time-barred unless they can be related to a timely incident as a 'series of separate but related acts' amounting to a continuing violation." *Beall v. Abbott Labs.*, 130 F.3d 614, 620 (4th Cir. 1997). Under the "continuing violation" theory, a "plaintiff may pursue a Title VII claim for discriminatory conduct that began prior to the filing period if [she] can demonstrate that the act is part of an ongoing practice or pattern of discrimination of the defendant." *Metsopulos v. Runyon*, 918 F.Supp. 851, 858 (D.N.J. 1996). "To establish that a claim falls within the 'continuing violation' theory, the plaintiff must demonstrate that at least one act occurred within the filing period . . . and that the discrimination is more than isolated or sporadic." *Id.* (citations omitted). In other words, if at least one of a series of separate acts falls within the statutory period, "the effect . . . is to sweep within the limitations period the earlier alleged acts of discrimination." *NAACP Labor Committee v. Laborers' Int'l Union, N. America*, 902 F.Supp. 688, 706 (W.D.Va. 1993) (quoting *Bradley v. Carydale Enterprises*, 707 F.Supp. 217, 222 (E.D.Va. 1989) (§ 1981 action)), *aff'd without op.*, 67 F.3d 293 (4th Cir. 1995).

In *Taylor v. Home Ins. Co.*, 777 F.2d 849 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), the Fourth Circuit held that a plaintiff can establish a continuing violation by showing the following elements: (1) the unlawful practice

must continue into the limitation period; (2) the claimant must file a timely charge with the EEOC; (3) the proof must establish that the unlawful practices are continuing or ongoing and that it currently affects the plaintiff. *Id.* at 856. A discrete act of discrimination which is not made the target of a timely charge "is merely an unfortunate event in history which has no present legal consequences." *Evans,* 431 U.S. at 558.

Although the Fourth Circuit has not adopted a test to "determine whether a series of allegedly related events constitutes a continuing violation as opposed to a series of isolated outbreaks," *Douglas v. Dabney S. Lancaster Community College,* 990 F.Supp. 447, 456 (W.D. Va. 1997), other courts have. *See DeNovellis v. Shalala,* 124 F.3d 298, 307 (1st Cir. 1997) ("continuing violation" denotes systemic violation); *Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989) (noting test inquires whether "plaintiff had no reason to believe he was a victim of discrimination until a series of adverse actions established a visible pattern of discriminatory mistreatment") (*dicta*), *aff'd after remand on other grounds,* 963 F.2d 375 (7th Cir. 1992). Under the Fifth Circuit's test first adopted in *Berry v. Bd. of Supervisors of Louisiana State Univ.,* 715 F.2d 971, 981 (5th Cir. 1983), *aff'd after remand,* 783 F.2d 1270 (5th Cir.), *cert. denied,* 479 U.S. 868 (1986), courts analyze three factors: "(1) whether the alleged acts constitute the same type of discrimination; (2) whether the alleged acts are frequent; and (3) whether the alleged acts 'have a degree of permanence which would trigger an employee's awareness and duty to assert his or her rights.' " *Demuren v. Old Dominion University,* 33 F.Supp.2d 469, 477 (E.D.Va.

1999) (quoting *Williams v. Enterprise Leasing Co.*, 911 F.Supp. 988, 996 (E.D.Va. 1995)).

Because the *Berry* test helpfully clarifies what constitutes an enduring discriminatory act, I shall apply it here. *Cf. Sloane v. Shalala*, No. 97-2295, 1998 WL 801499 at *2 (4th Cir. Nov. 18, 1998) ("It is unnecessary for us to adopt any of these tests in this case, for the simple reason that appellant fails to establish a continuing violation under any of them. As the Supreme Court has stated, the 'critical question' in a continuing violation case is 'whether any present violation exits.' ") (citation omitted).

C. Time-Barred Allegations and Claims

Defendant contends that Dr. Dachman failed to exhaust any claim arising from acts or omissions occurring more than 45 days prior to the plaintiff's first contact on February 24, 1995, with the EEO counselor to initiate a complaint of discrimination, that is, any act or omission occurring before 1995. These allegations include the following: (1) Dr. Siegel repeatedly and regularly yelled and screamed at her, belittled her in public, denied her mentoring, training, support and credit for her work, and made unwelcome sexual advances to her by repeatedly touching her forearm and turning off the lights in the office while they were working alone; (2) Dr. Siegel demeaned her religious practices by purposely scheduling meetings for Friday afternoons to make it more difficult for her to honor the Sabbath, gave her work to complete immediately before Jewish holidays, and called her "Mengele" knowing that her mother was a survivor of Auschwitz; (3) Drs. Weiss and Schwieterman conspired

with Dr. Siegel to discredit her; (4) Dr. Schwieterman called security to remove her from his office; (5) Dr. Schwieterman, without the benefit of an adequate investigation, accused her of leaving the threatening voice mail message and then filed a criminal complaint against her; (6) Dr. Siegel forced her to meet with a police officer regarding the complaint; and, (7) Dr. Siegel placed her on administrative leave, removed her as chair of the PLA committee, took away 90% of her work, and proposed her suspension.

It cannot be disputed by plaintiff that these acts of alleged discrimination were not reported timely to the EEO counselor. Dr. Dachman's deposition testimony and formal complaints filed with the EEO office establish that the acts she complains of occurred in 1994.

Dr. Dachman contends that at the time she sought EEO counseling in February 1995, she was subject to continuing violations, including race, sex, and religious discrimination, retaliation, and harassment/hostile work environment.[5] She contends that the above allegations focus on events that began in March 1994 and continued through January 13, 1995, and represent a continuing pattern of discrimination and retaliation by her supervisors, particularly Dr. Siegel. She asserts:

> Siegel harassed and treated plaintiff disparately and more harshly because she is a woman and an Orthodox Jew. He engaged in a continuous pattern of intimidation, ridicule and insult of

---

[5] Defendant correctly notes that plaintiff has not specifically alleged counts for harassment/hostile work environment.

> plaintiff over a two year period from January 1993 to January 1995, increasing in scope as they worked intensely on the GUSTO review beginning in March 1994, including verbal abuse, unwelcome touching, criticizing her work, facilitating her arrest, and causing her suspension.

Pl.'s Consol. Opp. at 32-33. She further contends that Dr. Seamon's acceptance of the recommendation for suspension on January 20, 1995, is part of the continuing violations and that she filed a timely claim of discrimination regarding the suspension.[6] Therefore, she argues, the 45 day filing period was tolled and the events occurring before January 10, 1995, are not time-barred.

With the exception of the 1995 execution of the proposed suspension, however, it is clear that the 1994 grounds of complaint are discrete acts of alleged discrimination, unlike and unrelated to the suspension finally imposed by Dr. Seamon. It is clear from Dr. Dachman's admissions on deposition that the pre-limitations events are isolated and sporadic rather than continuing in nature. Moreover, as a matter of law, Dr. Dachman was

---

[6] Defendant suggests that the continuing violation theory is not available to plaintiff because she never filed a discrimination charge against Dr. Seamon in respect to her suspension in January 1995. The record reflects, however, that Dr. Dachman submitted an affidavit as part of the investigation into her first filed charges and alleged that Dr. Seamon suspended her in retaliation for opposing Dr. Siegel's discriminatory conduct. *See* Pl.'s Resp. Def.'s Reply, Ex. 1, Resp. # 22, # 23. Accordingly, as a matter of law, Dr. Dachman timely filed a charge of discrimination with the EEO office regarding her January 1995 suspension.

fully aware of all the facts and circumstances surrounding her supervisors' treatment of her. *Indeed, her own attorney's September 7, 1994, letter brief to Dr. Seamon, filed in opposition to the proposed suspension, alleged that the suspension would constitute sex discrimination.* Thus, if a discriminatory motive animated any of the 1994 acts and decisions, its presence would have been apparent, and, manifestly, such motives were suspected. Dr. Dachman could have and should have invoked her rights in a timely fashion but she failed to do so. *See Demuren*, 33 F.Supp.2d at 477. Accordingly, the pre-1995 events are time-barred and defendant is entitled to summary judgment on all claims rooted in these events.[7]

D. Non-Barred Allegations and Claims

Apart from her termination claim which is not now before the court for consideration, Plaintiff's remaining claims are claims for "retaliatory harassment" and a claim for religious discrimination involving Dr. Keegan. I shall first address her retaliatory harassment claim.

---

[7] Defendant also correctly argues that many of the time-barred events also are not cognizable under Title VII because they do not represent materially adverse employment actions. *See Settle v. Baltimore County*, 34 F.Supp.2d 969, 987-89 (D.Md. 1999) (discussing, *inter alia*, *Page v. Bolger*, 645 F.2d 227 (4th Cir.) (in banc), *cert. denied*, 454 U.S. 892 (1981), and *Munday v. Waste Management of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1053 (1998)).

a. Retaliatory Harassment

In *Settle v. Baltimore County, Maryland,* 34 F.Supp.2d 969 (D.Md. 1999), recognizing that the Fourth Circuit has not explicitly acknowledged "retaliatory harassment" as a form of hostile work environment prohibited by Title VII, I stated:

> Consistent with emergent authority in other circuits, I presume that, on a proper factual showing, a plaintiff could meld together the elements of a "traditional" harassment claim, i.e. the creation of an objectively hostile work environment through severe and pervasive abusive conduct, with the essential elements of a "traditional" retaliation claim, i.e., reprisal for opposing or participating in the opposition to, discriminatory policies and practices.
>
> Thus, under such a claim, recovery might be available if, despite the absence of a racial or sexual nexus to the creation of the hostile environment, a prima facie case could be established showing that a hostile environment was motivated by improper retaliation. "Certainly harassment in retaliation for an employee's protected activities could constitute an 'adverse employment action.' " *Cobb v. Anheuser Busch, Inc.,* 793 F.Supp. 1457, 1491 (E.D. Mo. 1990); *Drake v. Minnesota Mining & Manuf. Co.,* 134 F.3d 878, 886 (7th Cir. 1998) ("retaliation can take the form of hostile work environment"); *Kim v. Nash Finch Co.,* 123 F.3d 1046, 1060 (8th Cir. 1997) (systematic retaliation in form of reduction of job duties, disciplinary action, negative personnel reports and required remedial training

constituted adverse employment action as a matter of law).

Settle, 34 F.Supp.2d at 994.

The post-January 10, 1995, events that form the basis of plaintiff's retaliatory harassment claim include: (1) her suspension in January 1995; (2) the Internal Affairs investigation regarding the threatening phone call to Dr. Schwieterman; (3) the detail to the Epidemiology division in February 1995; (4) the change in plaintiff's performance evaluation from "fully successful" to "marginally successful" and back to "fully successful"; (5) reassignment to the Oncology Branch in June 1995; (6) her suspension for 14 days in October/November 1995; (7) denial of the requested detail to Cardiovascular Devices; (8) leave restriction; (9) refusal to appoint plaintiff to committees; (10) refusal to give plaintiff work; (11) criticism of plaintiff's work; (12) refusal to approve leave requests; (13) exclusion of plaintiff from meetings and conversations regarding her work; (14) ordering the surveillance of plaintiff and her children; and, (15) calling the physician of plaintiff's daughter to inquire whether plaintiff had taken the daughter to an appointment. *See Spurlock v. NYNEX*, 949 F.Supp. 1022, 1028 (W.D.N.Y. 1996) ("The discriminatory use of disciplinary procedures, surveillance operations, investigations into the private lives of employees, the system by which job assignments are made, and access to overtime opportunities are all in theory potential methods of harassment.").

Despite the multitude of allegations, as a matter of law, plaintiff has failed to establish a prima facie case of

retaliatory harassment because she has not provided a basis, beyond her own subjective beliefs, that she has been targeted by her supervisors for disrespectful, career-thwarting treatment. To the contrary, a reasonable fact finder would be compelled on this record to conclude that Dr. Dachman's supervisors have almost without exception been *reactive* to whatever she has presented to them in the way of daily challenges to get her to come to work, remain at work, perform her duties in a professional manner and, most significant of all, to take supervisory instructions and directions respectfully and seriously.

What I said in *Settle* applies here: "In evaluating plaintiffs' efforts to project evidence of a prima facie case, it must be recalled that Title VII's protections do not insulate one from either the normal day-to-day dissatisfactions and annoyances commonly arising in any workplace or from the sometimes unpleasantness of a surly, strict or even personally insufferable and demanding supervisor." 34 F.Supp.2d at 991; *and see id.* at 993 ("Accordingly, '[s]ince supervision and [retaliation] are very different . . . a [retaliatory] animus cannot be inferred from the day-to-day conduct of supervisors that [plaintiffs] may deem inconvenient, inconsiderate or insufficiently solicitous.' " (citation omitted)). *See also Olivares v. NASA*, 934 F.Supp. 698, 705 (D.Md.1996) ("[T]he fact that an employee may have filed an EEO claim gives him no license to vilify supervisors or co-workers or indeed to make every response of theirs to such vilification the basis of a claim of retaliation.").

Furthermore, even if it is assumed that plaintiff has established a prima facie case of "retaliatory harassment"

based on the disciplinary and other actions taken against her, the criticisms she received, and her objection to the other seemingly ordinary business decisions actions related to her employment, defendant has offered legitimate, non-discriminatory reasons for the actions. Dr. Dachman has not come forward with evidence to establish – beyond her own subjective belief – that the proffered reasons were pretextual and that her supervisors' true motivations were retaliatory animus. " 'A jury may not . . . be allowed to infer [retaliation] from evidence that does no more than suggest it as a possibility.' " *Gibson v. Old Town Trolley Tours of Washington, D.C., Inc.*, 160 F.3d 177, 182 (4th Cir.1998) (quoting *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 245 (4th Cir.1982)) (alterations in *Gibson*). Here, the record positively refutes even the "suggestion" of a retaliatory motive. Accordingly, defendant is entitled to summary judgment.

b. Religious Discrimination

Finally, Dr. Dachman contends that Dr. Keegan did not reasonably accommodate her religious beliefs and practices. She accuses her supervisor of discrimination in that she limited her RCT to two hours on Fridays, required her to obtain approval for such leave and made it difficult for her to make up RCT.

In *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019 (4th Cir. 1996), *cert. denied*, 118 S.Ct. 58 (1997), the Fourth Circuit articulated the framework for analyzing religious accommodation claims. To sustain a claim for religious discrimination plaintiff must demonstrate that: (1) she has a bona fide religious belief that conflicts with

an employment requirement; (2) she informed the employer of this belief; and (3) she was disciplined for failure to comply with the conflicting employment requirement. *Id.* (citations omitted). "If the employee establishes a prima facie case, the burden then shifts to the employer to show that it could not accommodate the plaintiff's religious needs without undue hardship." *Id.* (citations omitted).

Dr. Dachman has failed to satisfy the first and third elements of the prima facie test. The leave restriction imposed by Dr. Keegan made clear that Dr. Keegan would "approve [Dr. Dachman] leaving work for up to two hours before the sun sets." Pl.'s Consol. Opp., Ex. 18 at 5. Dr. Dachman contends that this was too restrictive because "she needed more than 2 hours leave on Fridays to purchase her Sabbath food at a [particular] market." Pl.'s Consol. Opp. at 24. This contention is unavailing.

The record shows that Dr. Dachman told Dr. Keegan she needed to buy challah bread before 2:00 p.m. on Fridays. Dr. Dachman testified that she purchased challah bread from one store in the vicinity of the workplace. She said that store prepared the bread in the manner acceptable to her faith, but it closed at 2:00 p.m on Friday. Def.'s Reply, Ex. 1, at 170-80. Dr. Dachman testified, however, that she "wanted to only work till noon time so that [she] could start making [challah] bread, because [she] thought it would be great for the kids to see that. . . . But the two hours barely [gave her] enough [time]." Dachman Dep. at 162. She also testified that there were other stores where she could purchase the bread. There was no factual development of the actual operating hours of these stores.

In any event, Dr. Dachman testified that the challah bread was not a mandatory food item for observance of her Sabbath. She testified as follows:

> Q: Is that the only food item that is actually mandatory?
>
> A: It's not mandatory. If I wanted, I could do it with two hard rolls too. But that's not – you know, I hate to say it – it's like if you had Christmas dinner with Spam, you know?

Id. at 161.

Dr. Dachman's only other complaint regarding the two hour limitation was that it did not give her enough time to bath her children. *Id.* at 162. Clearly, Dr. Dachman has failed to establish that she had a bona fide religious belief that conflicts with the two hour leave restriction. The only reason she needed additional time was to permit her to purchase or make the challah bread. But it was not a mandatory food item. Significantly, Dr. Dachman concedes that Dr. Keegan never denied her the two hours leave and even granted her additional leave in excess of the two hours, although plaintiff asserts she had to "beg" for the additional leave. Pl.'s Consol. Opp., Ex. 2, ¶ 17.

Dr. Dachman also contends that Dr. Keegan applied the restriction and underlying agency policy in a discriminatory manner. She asserts that Dr. Keegan required that she submit leave slips for approval to take religious compensatory time and would often refuse to sign them in a timely manner. Dr. Dachman says this caused her to worry that she would be charged absent without leave. She also contends that Dr. Keegan interfered with her ability to earn RCT overtime to cover the leave she took

for religious observances. She asserts that Dr. Keegan would not assign her a sufficient amount of work assignments because she did not want Dr. Dachman to be able to earn the overtime. She asserts that this resulted in her being forced to charge the compensatory time to annual leave and leave without pay. *Id.*

These contentions, resting as they do on Dr. Dachman's uncorroborated assertions and subjective beliefs, do not carry probative force. "[A] subjective belief of discrimination, however genuine, [cannot] be the basis of judicial relief." *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556, 557 (5th Cir.1983), *cert. denied sub nom. Elliott v. Group Hospital Service, Inc.,* 467 U.S. 1215 (1984). It is perplexing, at best, as to why Dr. Dachman would have been concerned that she was going to be deemed AWOL. It is obvious from the language in the leave restriction memorandum that Dr. Keegan had committed to approving the two hour leave on a routine basis. Dr. Keegan testified that:

> [T]he fact that Dr. Dachman was not providing me with the leave slip in enough time for me to actually look at it and consider it and give it any time or attention, because of her needs, that we – Ms. Lepson thought that a more reasonable alternative would simply be to clarify how much religious compensatory time I would routinely grant.
>
> And that was the purpose of this memo, to identify basically that routinely I could agree that we could give her two hours.

Pl.'s Consol. Opp, Ex. 27 at 123.

Dr. Dachman cannot establish a prima facie case of discrimination based on this charge absent some showing that Dr. Keegan's actions conflicted with her religious beliefs. She concedes that Dr. Keegan never denied her religious compensatory time. Moreover, requiring plaintiff to obtain approval is an administrative requirement and is not actionable.

Finally, Dr. Dachman has presented no evidence to support her bald and conclusory assertions made by affidavit and on deposition that she was forced to charge RCT to annual leave and leave without pay because Dr. Keegan would not assign her work. "When an inference can be supported by evidence to save it from the status of speculation, . . . the non-moving party should present that evidence." *Felty v. Graves-Humphreys Co.*, 818 F.2d at 1128; *see also Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 889 (1990) ("There is some room for debate as to how 'specific' must be the 'specific facts' that Rule 56(e) requires in a particular case," a nonmovant cannot defeat a motion for summary judgment by merely "replac[ing] conclusory allegations of the complaint . . . with conclusory allegations of an affidavit."); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996) ("[S]ummary judgment affidavits cannot be conclusory.").

Dr. Keegan, on the other hand, has denied under oath that she made it difficult for Dr. Dachman to earn RCT overtime and presented specific information about how much work she assigned and when. She also established the times when plaintiff earned and was denied RCT. Dr. Keegan stated:

> Dr. Dachman has been permitted to work all RCT as requested, with one exception. On April 8, 1996, Dr. Dachman submitted a request on an SF-71 to work 34 hours of RCT as "1-2 hours per day" from "April 8 through April 30, 1996." This request was not approved because it would have been impossible to determine when RCT was being worked and when credit time was being accrued, which would have created significant difficulties for the timekeeper in maintaining an accurate record of compensated RCT. This was particularly problematic because RCT can be worked before *or* after the RCT is taken, which is not true of credit time. . . . However, between 2/19/96 and 4/14/96, Dr. Dachman did have approval to work RCT on 21 days; of these, she actually worked RCT on 12 days and came during previously unscheduled times to perform RCT on an additional 5 days.
>
> I deny that I did not provide sufficient work assignments in order for Dr. Dachman to make up time taken for religious activity. . . . Dr. Dachman's has had ample work available in the form of original [investigative new drug] submissions, IND amendments, and revisions of written work products. [She] was assigned 5 new INDs in September 1995, 1 in November 1995, 1 in December 1995, 2 in January 1996, 2 in February 1996, 3 in March 1996, and 3 in April 1996. During this period, Dr. Dachman received multiple amendments to existing INDs. Many were not reviewed and returned to the Document Control room for months.

Def.'s Mot. Summ. J., Ex. 29 at 3. In light of the defendant's showing, no reasonable juror could rationally find by a preponderance of the evidence that Dr. Keegan acted

intentionally to burden Dr. Dachman's exercise of her religious faith and defendant is entitled to summary judgment on the religious discrimination claim.

IV. CONCLUSION

For reasons stated herein, plaintiff's claims fail and defendant is entitled to summary judgment.

Filed: April 13, 1999

/s/ Andre M. Davis
ANDRE M. DAVIS
United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN,	:	
Plaintiff	:	
	:	CIVIL NO.
v.	:	AMD 96-873
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES,	:	
Defendant	:	

...o0o...

ORDER

For the reasons stated in the accompanying memorandum, it is this 13th day of April, 1999, by the United States District Court for the District of Maryland, ORDERED

(1) That the defendants' motion for summary judgment is GRANTED AND JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT AS TO ALL CLAIMS EXCEPT PLAINTIFF'S CLAIM OF DISCRIMINATORY DISCHARGE; and it is further ORDERED

(2) That the parties shall conclude discovery on plaintiff's termination claims on or before June 15, 1999, and dispositive motions, if any, shall be filed on or before July 15, 1999; and it is further ORDERED

(3) That plaintiff's motions to compel and for reconsideration (Paper Nos. 116, 117 and 119) are DENIED; and it is further ORDERED

(4) That the Clerk of the Court TRANSMIT a copy of this Order and the foregoing Memorandum to counsel of record and to plaintiff pro se.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN,	:	
Plaintiff	:	
	:	CIVIL NO.
v.	:	AMD 96-8763
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES,	:	
Defendant	:	

...o0o...

ORDER

Pending before the court are the following motions: Plaintiff's motions: (a) for reconsideration of the court's order granting defendant's motion for summary judgment; and (b) for modification of the scheduling order. The motions have been fully briefed and no hearing is necessary. Local Rule 105.6 (D.Md. 1997). The motions shall be denied.

A. The motion for reconsideration of the court's grant of summary judgment to defendant is simply a rehash of the arguments Plaintiff presented in her briefs on summary judgment.

B. The motion for modification of the scheduling order is Plaintiff's attempt to prolong this litigation in hopes of relitigating matters that are no longer at issue in

this suit. These issues were disposed of on summary judgment.

Because the Court believes that its prior order was not erroneous and the interests of justice will not be served by granting either of Plaintiff's motions, the Court shall deny both motions.

Accordingly, it is by the United States District Court for the District of Maryland this 12th day of May, 1999, ORDERED that Plaintiff's motions for reconsideration of the court's grant of summary judgment and modification of the scheduling order are DENIED. It is further ORDERED that the Clerk of the Court shall TRANSMIT a copy of this Order to Plaintiff and counsel for Defendant.

/s/ Andre M. Davis
ANDRE M. DAVIS
UNITED STATES DISTRICT
JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN,	:	
Plaintiff	:	CIVIL NO.
v.	:	AMD 96-873
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES,	:	
Defendant	:	

...o0o...

MEMORANDUM

Plaintiff, Sarah Rebecca Dachman, M.D., is a former employee of the Food and Drug Administration ("FDA"), an agency of the Department of Health & Human Services. She instituted this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e ("Title VII"), alleging the agency discriminated against her on the basis of sex, race and religion, and that it retaliated against her when she sought to combat the unfair and discriminatory treatment to which she alleges she was subjected.[1] In a memorandum filed on April 13,

---

[1] Dr. Dachman was represented by counsel throughout the administrative processing of her claims and up until the conclusion of the first round of discovery in these proceedings. She is presently unrepresented, however, having discharged her original counsel as well as successor counsel.

1999, this court addressed in detail all of Dr. Dachman's claims except her termination claims, which were joined in this case by amended complaint. *See Dachman v. Shalala*, 46 F.Supp.2d 419 (D.Md. 1999). For the reasons stated therein, the court entered judgment in favor of defendant as to all claims except plaintiff's termination claims. Now ending are the parties' cross-motions for summary judgment as the termination claims. No hearing is necessary.

In a meticulously-detailed 60-page, single-spaced memorandum dated September 29, 1997, Dr. Dachman's supervisor, Dr. Patricia Keegan, set forth the reasons for her proposal that Dr. Dachman be discharged from federal service. Specifically, Dr. Keegan explained the factual details underlying the four bases on which Dr. Dachman's discharge from employment was assertedly justified: (1) Repeated Failure to Follow Supervisory Instructions; (2) Repeated Unauthorized Absences; (3) Unacceptable Conduct; and (4) Misuse of Government Equipment. *See* Def.'s Supp. Mot. Summ. Judgmt., Exh. 1.

Prior to any action on the proposed termination of Dr. Dachman's employment, Dr. David J. Feigal, Jr., the Deputy Director of the Food and Drug Administration's Center for Biologics Evaluation, the ultimate decision-maker, who had no personal knowledge of Dr. Dachman and her troubled tenure at the FDA, afforded Dr. Dachman and her attorney an extended opportunity to provide written responses to the memorandum submitted by Dr. Keegan. Both Dr. Dachman and her attorney submitted written responses opposing the proposal to discharge Dr. Dachman from federal employment. No oral hearing was requested of Dr. Feigal.

Effective February 8, 1998, Dr. Feigel issued his 23-page analysis and decision in which he considered each and every one of the issues raised in the responses provided by Dr. Dachman and her counsel. *Id.*, Exh. 10. He rejected Dr. Dachman's opposition, adopted Dr. Keegan's proposal and terminated Dr. Dachman's employment.[2] The court has carefully reviewed the record, including Dr. Dachman's numerous pro se filings in support of her motion for summary judgment and in opposition to the defendant's motion for summary judgment. On the basis of the record before the court, it is clear beyond question that no reasonable juror could conclude that the termination of Dr. Dachman's employment was motivated by animus based on any prohibited criterion or that her discharge was an act of retaliation.

---

[2] Dr. Dachman has repeatedly insisted that she was effectively terminated on or about September 29, 1997, the date of Dr. Keegan's memorandum, because with the exception of a handful of days between September 29, 1997 and February 8, 1998, she was not paid a salary, although she was ostensibly on "paid administrative leave" during that period. The record shows, however, that when Dr. Dachman refused to come to work to meet with Dr. Keegan on September 29, 1997, to receive the memorandum proposing her dismissal, the agency properly listed her status as "absent without leave" and only paid her on days which she had previously arranged to be on paid leave and on holidays.

Accordingly, plaintiff's discriminatory and retaliatory termination claims fail and defendant is entitled to summary judgment. An order follows.

Filed: March 6, 2000

/s/ Andrea M. Davis
ANDREA M. DAVIS
United States District
Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN, Plaintiff	:	
v.	:	CIVIL NO. AMD 96-873
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant	:	(Filed Mar. 6, 2000)

ORDER

For the reasons stated in the accompanying memorandum, it is this 6th day of March, 2000, by the United States District Court for the District of Maryland, ORDERED

(1) That the plaintiff's motion for summary judgment is DENIED, defendant's supplemental motion for summary judgment is GRANTED AND JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT AS TO ALL CLAIMS; and it is further ORDERED

(2) That the Clerk of the Court shall CLOSE THIS CASE and TRANSMIT a copy of this Order and the foregoing Memorandum to counsel of record and to plaintiff pro se.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN, Plaintiff	:	
v.	:	CIVIL NO. AMD 96-873
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES,	:	(Filed Mar. 17, 2000)
Defendant	:	

ORDER

Plaintiff's motion for reconsideration has been read and considered. To the extent plaintiff complains that the court failed to consider her motion to amend to add *Bivens* claims, that motion is denied.[1] In all other respects, for the reasons set forth in the earlier opinions in this case, the motion for reconsideration is DENIED this 17th day of March, 2000.

---

[1] To the extent that plaintiff complains that she was denied an opportunity to conduct discovery as to her termination claims, the record belies such an assertion. Although the court denied a request for leave to take depositions in the summer of 1999, the court specifically deferred ruling on her termination claims to afford her the opportunity to take supplemental discovery upon a showing that such discovery was reasonably necessary, given the vastness of the discovery taken during the period when she was represented in this case by counsel. Plaintiff never made such a showing.

The Clerk of the Court shall TRANSMIT a copy of this Order to counsel of record and to plaintiff pro se.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN, Plaintiff	:	
v.	:	CIVIL NO. AMD 96-873
DONNA SHALALA, SECRETARY, DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendant	:	(Filed May 16, 2000)

ORDER

Plaintiff's second motion for reconsideration has been read and considered. Assuming without deciding that this Court has jurisdiction to adjudicate the motion, the motion for reconsideration is DENIED this 16th day of May, 2000.

The Clerk of the Court shall TRANSMIT a copy of this Order to counsel of record and to plaintiff pro se.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1705

S. REBECCA DACHMAN,

Plaintiff-Appellant,

versus

DONNA A. SHALALA, Department of Health and Human Services,

Defendant-Appellee,

and

KAREN D. WEISS,

Party-in-interest.

MARGARET MITRANE, M.D.,

Movant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Andre M. Davis, District Judge. (CA-96-873-AMD)

Submitted: September 9, 1999

Decided: September 14, 1999

Before ERVIN, WILKINS, and HAMILTON, Circuit Judges.

PER CURIAM:

S. Rebecca Dachman appeals from a district court order granting the Defendant summary judgment as to all of Dachman's employment discrimination claims except Dachman's claim of discriminatory discharge. We dismiss the appeal for lack of jurisdiction because the order is not appealable. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (1994), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (1994); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). The order here appealed is neither a final order nor an appealable interlocutory or collateral order.

We dismiss the appeal as interlocutory. In light of the concern Dachman expresses in her informal brief regarding waiver of her right to appeal, we note that our dismissal is without prejudice. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEWIS F. POWELL, JR.
UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

PATRICIA S. CONNOR
CLERK

TELEPHONE
(804)916-2700

July 13, 2001

Richard Lee Swick, Esq.
SWICK & SHAPIRO, PC
Suite 1290
1225 Eye Street, NW
Washington, DC 20005

Jennifer Lilore Huesman, Esq.
OFFICE OF THE U. S. ATTORNEY
6625 United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Matthew Ely Jaffe, Esq.
10215 Nolan Drive
Rockville, MD 20850

RE: 00-1641 Dachman v. Shalala, Sec
CA-96-873-AMD

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

By: /s/ Deborah S. Daniel
Deputy Clerk

Enclosure(s)

cc: Felicia Cannon

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 13, 2001

No. 00-1641
CA-96-873-AMD

S. REBECCA DACHMAN

Plaintiff-Appellant

v.

DONNA E. SHALALA,
SECRETARY, UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Defendant-Appellee

and

KAREN D. WEISS

Party in Interest

MARGARET MITRANE, M.D.

Movant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

APPENDIX K

FOURTH CIRCUIT COURT OF APPEALS

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because this employment discrimination case involves a question of federal law under Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. § 2000e *et seq*). The district court entered final judgment on March 17, 2000. Appellant filed a timely notice of appeal on May 3, 2000. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Food and Drug Administration (FDA) discriminated against S. Rebecca Dachman, M.D., based upon the fact that she is an observant Orthodox Jew, when it abandoned an accommodation that had been compatible with her religious beliefs and the reasonable requirements of the FDA for five years, by refusing to allow her more than two hours leave on Friday afternoons.

2. Whether discrimination and retaliation in the form of suspending Dr. Dachman from duty in January 1995, initiating an internal affairs investigation against her, detailing her to a position with less prestige and a reduced amount of responsibilities, lowering of her performance evaluation ratings, reassigning her to a branch where there was no potential for advancement, refusing to transfer her to a position that was appropriate considering her background and

training, refusing to appoint her to various committees, refusing to adjust her schedule so that she could work during time that did not conflict with her religious beliefs, continual unfounded criticism of her work, refusal to grant her religious compensatory leave in a timely fashion, surveillance of her and her children, and calling third parties to check up on her, constituted materially adverse employment actions against Dr. Dachman.

3. Whether the acts of discrimination and retaliation by Dr. Dachman's FDA supervisors, including the refusal to allow her more than two hours leave on Friday afternoons constituted a continuing practice of discrimination.

4. Whether Dr. Dachman's FDA supervisors discriminated and/or retaliated against her on the basis of her religion when they placed her on leave restriction thereby intentionally depriving her of accommodation essential for her to freely practice her religion.

5. Whether the district court properly granted summary judgment with respect to Dr. Dachman's claims of discrimination and retaliation.

6. Whether Dr. Dachman's termination from her position as a Medical Officer with the FDA was the product of discrimination based upon the fact that she is an observant Orthodox Jew and/or retaliation for her having requested accommodation or complained of past acts of discrimination.

7. Whether the district court properly granted summary judgment with respect to Dr. Dachman's claims of discrimination and retaliation based upon her termination from her position as a Medical Officer with the FDA.

STATEMENT OF CASE

From 1988 until approximately 1993, Dr. Rebecca Dachman was able to pursue her immensely successful career as a physician with the Center for Biologics Evaluation and Research ("CBER"), a department of the United States Food and Drug Administration ("FDA"), while simultaneously observing the strict tenets of her Orthodox Jewish faith. Indeed, in 1993, Dr. Dachman was named Chair of the largest project ever conducted by CBER, the GUSTO Product License Application advisory committee ("GUSTO"). Her ability to successfully balance her hectic work schedule and strict religious observation was in large part attributable to the accommodation afforded her by the FDA which allowed her to take off Friday afternoons to prepare for

* * *

APPENDIX L

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

S. REBECCA DACHMAN,
717 SONATA WAY
SILVER SPRING, MARYLAND 20901

Plaintiff,

v.

Civil Action No.
AMD 96873
(Jury Trial)

DONNA SHALALA,
SECRETARY,
DEPARTMENT OF HEALTH &
HUMAN SERVICES
200 INDEPENDENCE
AVENUE, S.W.
WASHINGTON, D.C. 20201

Defendant.

COMPLAINT FOR RELIEF FROM EMPLOYMENT DISCRIMINATION, REPRISAL AND BURDEN ON FREE EXERCISE OF RELIGION

Nature of the Claim

1. This action contains claims for sex, race and religious discrimination, for burdening the free exercise of religion, and for reprisal in federal employment. Defendant Shalala, her agents and employees have violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e ("Title VII") and the Religious Freedom Restoration Act of 1993, 42 U.S.C. Section 2000bb ("RFRA"), by harassing plaintiff, by denying her employment opportunities and disciplining her because of her sex, race and religion, by burdening her free exercise of

religion, and by retaliating against her for opposing defendant's discriminatory practices.

2. As relief, plaintiff claims back pay, compensatory damages, punitive damages, religious accommodation, a transfer, a restoration of leave, a cleansing of her record, and attorney fees and costs.

* * *

22. On or about May 19, 1995, the Office of Internal Affairs found that Dr. Schwieterman's charge against plaintiff was unsubstantiated. On or about May 27, 1995, when plaintiff's detail was complete, plaintiff requested that she be reinstated to her previous position. The Agency denied plaintiff's request and on June 7, 1995, it permanently assigned plaintiff to the Oncology Branch of the Division of Clinical Trial Design and Analysis where Drs. Weiss and Siegel would again be her second and third level supervisors. This is a deadend position for plaintiff because such position does not utilize plaintiff's background and expertise, and, unlike the other doctors in the Branch, she is not an oncologist. When plaintiff attempted to discuss this reassignment with management with her own counsel present, the Agency proposed her suspension and she was ultimately suspended for fourteen days.

23. Because of the lack of advancement opportunities in Oncology, plaintiff arranged a detail to Cardiovascular Devices in another FDA Center in July 1995 and requested Dr. Siegel to approve the detail. Dr. Siegel did not respond. But in August 1995 and then again on November 16, 1995, Dr. Weiss denied the detail on

grounds that were contrary to Agency regulation and procedure.

24. On November 17, 1995, Patricia Keegan, M.D., plaintiff's first level supervisor in Oncology, placed plaintiff on leave restriction based on an erroneous calculation of leave plaintiff had previously taken. Under this restriction, plaintiff must report and receive supervisory approval whenever she is out of the office for more than fifteen minutes under penalty of discipline, including termination. The result is that even though plaintiff has left work early every Friday for nearly seven years to observe the Sabbath, plaintiff has to obtain Dr. Keegan's signed approval on her leave slip every Friday before she can take leave. Dr. Keegan has unreasonably withheld such leave approval and, at times, has prohibited plaintiff's making up her religious time off. The Agency's actions have burdened plaintiff's free exercise of her religion.

25. On November 30, 1995, plaintiff signed her evaluation for the 1994/5 year. At that time, plaintiff was rated fully successful. Subsequent to her signing the evaluation, in violation of applicable procedures, Dr. Keegan changed the rating to marginally successful without notifying plaintiff. It was only on January 18, 1996, after she made several requests to management that plaintiff became aware that Dr. Keegan had downgraded her without her knowledge.

26. There is an abundance of work at the Agency. Nevertheless, for approximately eight months, the Agency has given plaintiff little if any work to do.

27. On a continuing basis since November 1993, the Agency has subjected plaintiff to a continuing pattern of harassment because of her sex, race, religion and opposition to the Agency's discriminatory practices and for filing discrimination charges.

28. As a result of defendants' actions, plaintiff has lost salary and benefits, suffered mental and physical distress and a loss of reputation, and incurred substantial attorneys' and expert witness fees and costs.

29. The Agency's actions have been reckless, wanton, wilful, and in callous disregard of plaintiff's rights.

Exhaustion of Remedies

30. On or about April 25, 1995, plaintiff filed a timely formal administrative discrimination complaint. More than 180 days have passed since the filing of that complaint. Plaintiff also filed formal administrative discrimination complaints on November 20, 1995 and February 28, 1996.

Count I
Discrimination Because of Sex

31. The allegations of Paragraphs 1-30 of the Complaint are incorporated herein by reference and made a part hereof.

32. The Agency has discriminated against plaintiff on the basis of her sex in the terms, conditions and privileges of her employment, in denying her employment opportunities and in disciplining her in violation of Section 703(a)(1) & (2) of Title VII of the Civil Rights Act

of 1964, 42 U.S.C. Section 2000e-2(a)(1) & (2). Similarly situated males have been treated better than plaintiff.

Count II
Discrimination Because of Race Discrimination

33. The allegations of Paragraphs 1-32 of the Complaint are incorporated herein by reference and made a part hereof.

34. The Agency has discriminated against plaintiff on the basis of her race in the terms, conditions and privileges of her employment, in denying her employment opportunities and in disciplining her in violation of Section 703(a)(1) & (2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1) & (2). Similarly situated persons who are not Orthodox Jews have been treated better than plaintiff.

Count III
Discrimination Because of Religion

35. The allegations of Paragraphs 1-34 of the Complaint are incorporated herein by reference and made a part hereof.

36. The Agency has discriminated against plaintiff because of religion in the terms, conditions and privileges of her employment, in denying her employment opportunities and in disciplining her in violation of Section 703(a)(1) & (2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a)(1) & (2). Similarly situated persons who are not Orthodox Jewish have been treated better than plaintiff.

Count IV
Discrimination Because of Opposition
to Discriminatory Practices

37. The allegations of Paragraphs 1-36 of the Complaint are incorporated herein by reference and made a part hereof.

38. The Agency has retaliated against plaintiff because of her opposition to its discriminatory practices and her filing discrimination charges in the terms, conditions and privileges of her employment and in denying her employment opportunities and in disciplining her in violation of Section 704(a), of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-3(a).

Count V
Burdening Free Exercise of Religion

39. The allegations of Paragraphs 1-38 of the Complaint are incorporated herein by reference and made a part hereof.

40. The Agency has burdened the free exercise of plaintiff's religion by requiring her to seek approval every Friday prior to taking religious leave, withholding leave approval, and prohibiting her from making up religious time off in violation of the Religious Freedom Restoration Act, 42 U.S.C. Sections 2000bb, *et seq.*

Prayer for Relief

Wherefore, plaintiff respectfully requests that she be granted the following relief:

a. A declaration that defendant discriminated against plaintiff and burdened the free exercise of her religion;

b. An injunction against further discrimination, including a failure to accommodate plaintiff's religious observances;

c. Back pay and interest as provided by law;

d. Compensatory damages as provided by law;

e. Punitive damages as provided by law;

f. Cleansing plaintiff's official personnel file and other employment records of derogatory comments and references to her arrest on false charges;

g. Restoration of leave;

h. Attorney fees and costs as provided by law; and

i. All other legal and equitable relief to which plaintiff may otherwise be entitled, including but not limited to transferring plaintiff to Cardiovascular Devices.

Jury Demand

Plaintiff hereby demands a jury trial on all her claims.

Verification

Under penalty of perjury, I swear that I have reviewed the the factual statements in this Complaint and that they are true and correct to the best of my knowledge.

3/20/96
Date

/s/ Rebecca S. Dachman
Rebecca S. Dachman

Respectfully submitted,

/s/ Francine K. Weiss
Francine K. Weiss #02671
Kalijarvi, Chuzi & Newman, P.C.
1730 K Street, N.W., #1011
Washington, D.C. 20006
(202) 331-9260

Counsel for Plaintiff

APPENDIX M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service
Food and Drug Administration
Center for Biologics Evaluation and Research

Memorandum

Date: 11-Mar-1996 06:19am EST
From: Rebecca Dachman, M.D.
DACHMAN
Dept: HFM-576
Tel No: FTS 594-0493

TO: Patricia Keegan, M.D. (KEEGAN)
TO: Karen Weiss, M.D. (WEISS)
TO: Jay P. Siegel (SIEGEL)
TO: Kathryn C. Xoon, Ph.D. (ZOON)

Subject: RCT

Pat:

On Friday I approached you at least twice regarding my leave slip. As a mattter of fact I delayed leaving in order to get a signed leave slip (and left in such a rush that I forgot to sign out). When I approached you prior to leaving you refused to sign the slip saying you would get it done later (which is what you did). It is harassing to leave Fridays without the slip (as a matter of fact the minute the Sabbath was over I came in to check on the slip). This behavior is harassing and retaliatory and highly unprofessional. It takes a second to sign the slip.

Rebecca Dachman, M.D.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service
Food and Drug Administration
Center for Biologics Evaluation and Research

Memorandum

Date: 19-Apr-1996 07:54am EST
From: Rebecca Dachman, M.D.
DACHMAN
Dept: HFM-576
Tel No: FTS 594-0493

TO: Patricia Keegan, M.D. (KEEGAN)
Subject: RCO

Pat:

Yesterday I found unsigned RCO slips in my box. Are they approved or not approved? I also left a series of slips on your chair this AM.

Rebecca

APPENDIX N

AGENCY ACKNOWLEDGEMENT THAT RCT IS NOT LEAVE

* * *

Given the frequency with which you use RCT, I find your supervisor's attempt to provide structure to this situation wholly appropriate. Nor do I find compelling the fact that you believe RCT should not be considered as leave. RCT is not leave in the technical sense, but does represent your absence from the office. Part of the purpose of a leave restriction is to establish parameters for working hours and the approval of leave so that your presence in and absences from the office are both accurate and predictable. As such, your leave restriction involved both leave and compensatory time. As your supervisor, Dr. Keegan was concerned about your absences from the office and it was appropriate for her to set parameters for your use of RCT. It is not unreasonable for her to request that you provide acceptable, adequate notification for leave and RCT. From the description of the hours requested for the Sabbath, the time that you actually used was highly variable. Other than knowing it would involve a Friday, it was not possible for your supervisor to routinely know if you would be available for meetings, conferences, or other team activities.

* * *

APPENDIX O

* * *

HHS Instruction 550-11
Personnel Manual
HHS Transmittal 87.24 (9/18/87)

* * *

550-11-50 POLICY

A. Employees may be granted religious compensatory time for religious observances when personal religious beliefs require them to be absent from work during periods of the workday or workweek. Religious compensatory time for such observances will be granted *except* when the adjustment of the work schedule will interfere with the efficient accomplishment of the organization's mission.

B. An employee may earn religious compensatory time for a religious observance in advance or after the fact by performing approved religious compensatory overtime work. An employee should not generally be allowed to earn religious compensatory time more than four pay periods before or after the religious compensatory time is scheduled to be used (see paragraph 550-11-60D.3).

C. An employee may not perform religious compensatory overtime work at home to earn religious compensatory time.

D. Religious compensatory overtime work performed to earn or repay religious compensatory time may not be converted to pay except on separation and may never be converted to premium pay (as discussed in subsection 550-11-60F below).

E. Religious compensatory time may not be granted for (non-religious compensatory) overtime work that has been previously performed.

550-11-60 PROCEDURAL GUIDELINES

A. Employee Requests

1. Employees must request approval of compensatory time for religious observances from appropriate leave-approving officials in advance in writing. OPDIVs may prescribe that such requests be submitted on Standard Form 71 (to include appropriate attachments), by memorandum, or via other forms that the OPDIVs may devise.

2. A request must include all of the following information:

   a. The date(s) and number of hours requested

   b. A clear explanation of the sincerely held personal religious belief that requires absence from work at the time requested

   c. The proposed date(s) on which the religious compensatory overtime work will be performed

B. Evaluating Employee Requests

1. Before granting an employee's request for religious compensatory time, the leave-approving official must ensure that the employee has provided the information required in A.2 above. If the employee fails to provide the required information the leave approving official should so inform the employee and return the request without action.

2. If a leave-approving official is unsure whether an employee's explanation of the religious belief is acceptable, he/she should consult with a higher-level supervisor or the staff in the appropriate servicing personnel office before taking action on the request.

3. A leave-approving official shall deny an employee's request for religious compensatory time if approving such a request would interfere with the efficient accomplishment of the organization's work. The following are some examples of situations that would constitute interference with the efficient accomplishment of an organization's work:

   a. When high priority work will not be timely performed

   b. When approval of religious compensatory time will result in unsafe working conditions for co-workers

   c. When essential work cannot be performed by another qualified employee during the period of absence (e.g., when another employee's leave request has been approved previously)

   d. When there is not work available that can be appropriately performed during overtime periods

   e. When approval of the request will result in more than a nominal increase in operating costs

   f. When approval of religious compensatory time will result in compromising the employment entitlements of other employees.

C. Action on Employee Requests

1. The delegation of authority for approval or disapproval by leave-approving officials of requests for religious compensatory time is contained in Exhibit 550-11-A.

2. Approvals of requests for religious compensatory time must be documented. When a request is disapproved, it must be done by a written notice to the employee that specifies the reason for disapproval.

D. Scheduling Religious Compensatory Time and Religious Compensatory Overtime Work

1. Operating Divisions (OPDIVs) must establish procedures for scheduling religious compensatory time in conjunction with procedures for scheduling leave and other planned absences from work.

2. At the time the leave-approving official approves the request for religious compensatory time, he or she should schedule in writing when the religious compensatory overtime work should be performed. While the employee's preference should be taken into account in scheduling the religious compensatory overtime work, and reasonable efforts made towards finding mutually acceptable scheduling alternatives, the final consideration must be the efficient accomplishment of the organization's mission.

3. Religious compensatory overtime work should be scheduled to be performed within four pay periods before or after the requested religious compensatory time off. No employee will be allowed to perform religious compensatory overtime work before religious compensatory time is approved and scheduled. Exceptions to the

scheduling of religious compensatory overtime work within four pay periods of the religious compensatory time must be approved by the next level of supervision above the approving official.

4. Once scheduled, religious compensatory overtime work and religious compensatory time shall be considered as part of the employee's regularly scheduled tour of duty. The supervisor must approve any changes in the adjusted work schedule.

   a. If an employee fails to adhere to the schedule, the time off will normally be charged to annual leave or leave without pay (LWOP) at the employee's option.

   b. If there is not a sufficient balance of annual leave or the employee declines to request annual leave or LWOP for the balance, the excess religious compensatory time will be charged as absence without leave.

5. If an employee has performed approved religious compensatory overtime work to take time off for a religious observance and subsequently is unable to take the time off, the supervisor must schedule the religious compensatory time to be used for religious purpose at a later time. The employee will retain credit for religious compensatory time earned until it is either used or the employee separates (see paragraph 550-11-60F.2).

E. Earning and Using Religious Compensatory Time

1. Supervisors are responsible for determining what work will be performed during the approved period of religious compensatory overtime and for oversight of work performed, just as is

required for overtime work generally, in accordance with applicable OPDIV or STAFFDIV requirements.

2. Supervisors may permit employees to earn and use religious compensatory time in the same increments as they are permitted to earn leave and overtime.

* * *

APPENDIX P

[LOGO]

U.S. Department of Justice

United States Attorney
District of Maryland
Northern Division

6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

Lynne A. Battaglia
United States Attorney

410-209-4800
TTY/TDD: 410-962-4462
410-209-4816
FAX 410-962-9942

George L. Russell, III
Assistant United States Attorney

July 22, 1999

Dr. S Rebecca Dachman
717 Sonata Way
Silver Spring, Maryland, 20901

RE: *Dachman v. Shalala*

Dear Dr. Dachman:

The purpose of this letter is to respond to the plaintiff's requests for admissions in the above captioned case. As I explained to you in previous correspondence, it was the defendant's contention that you exceeded the number of requests for admissions. Now that you have identified 30 requests you seek to have answered. The defendant responds to your numbered requests as follows[1]:

---

[1] It should be noted that the defendant continues to object to these requests as they are vague and ambiguous and/or irrelevant. The defendant notes her objection with a "a"

1. Deny*
2. Deny*
3. Deny*
4. Deny*
5. Deny*
6. Deny*
7. Deny*
8. Deny*
9. Deny*
10. Deny*
11. Deny*
12. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny.*
13. Deny*
14. Deny*
15. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny*.
16. Deny*
17. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny*.
18. Defendant cannot admit or deny this request as the document to which it refers is not order. to te [sic] extent a answer is required, deny*.
19. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny*.
20. Admit*

21. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny*.

22. Defendant cannot admit or deny this request as the document to which it refers is not order. To te [sic] extent a answer is required, deny*.

23. Deny*
24. Deny*
25. Deny*
26. Deny*
27. Deny*
28. Deny*
29. Deny*

As to the balance of these requests, the documents sent were out of order, thus, the defendant cannot answer the balance of the requests.

A certification page will e [sic] forwarded to you.

Very truly yours,

Lynne A. Battaglia
United States Attorney

By: George L. Russell
George L. Russell, III
Assistant United States Attorney

cc: Barry Smith Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

S REBECCA DACHMAN, Plaintiff v DONNA SHALALA SECRETARY DEPARTMENT OF HEALTH & HUMAN SERVICES Defendant	)	Civil Action No. 96-873 (AMD)

Plaintiff's Request for Admission (Revised)

Pursuant to FRCP 36 Plaintiff submits and requests that Defendant respond to the following requests for admission within the time permitted.

Request for Admission

Plaintiff S Rebecca Dachman requests that the Defendant, Donna Shalala, and her employees admit the following.

Definitions

In the following Request for Admission the terms used shall be defined as follows

1. "threat call" refers to the call received on July 15, 1994 at 1:15 PM on W Schwieterman's answering machine

2. "DHHS" Department of Health and Human Services

3. "DEPI" Division of Ethics and Professional Integrity

4. "DCTDA" Division of Clinical Trial design and Analysis

5. "OTRR" Office of Therapeutics Research and Review

6. "RCT" Religious Compensatory Time

7. "RCO" Religious Compensatory Overtime

8. "PLA" Product License Application

9. "OIA" Office of Internal Affairs

10. "The Agency" or "Agency" Defendant Shalala and her employees

Requests for Admission:

1. The attached page from the proposal to remove is authentic (exh. 1)

2. From October 2, 1997 until February 6, 1998, the Agency failed to provide official notice to Dr. Dachman that she was not going to be paid during the period October 2, 1997 until February 6, 1998

3. The leave restriction letter dated November 1995, cited approved leave requests as the basis for the disciplinary letter.

4. The e-mail in exh. 2 is authentic

5. Until November 1995, Dr. Dachman had never received any disciplinary notices regarding improper use of religious compensatory time or religious compensatory overtime.

6. The affidavit attached hereto in exhibit 3(a) is authentic

7. The e-mails attached hereto as exhibit 3(b) are authentic

8. J Siegel, Weiss, Keegan did not ease the religious leave restriction requirements placed on Dr. Dachman during the period November 1995 until February 1998.

9. The form attached hereto in exhibit 4 is authentic

10. Exhibit 5(a) is authentic

11. Exhibit 5(b) is authentic

12. J Siegel, K Weiss, P Keegan did not require prior approval for credit time at any time during the course of the events described herein for DCTDA reviewers except for Dr Dachman

13. Exhibit 6(a) is authentic

14. Exhibit 6(b) is authentic

15. The leave restriction letter dated November 1995 was renewed in May 1996, November 1996 and May 1997 without any documentation of violations.

16. Exhibit 6(c) is authentic

17. "Days" in the DHHS manual refers to "calendar days" not "work days"

18. Exhibit 7 is authentic

19. Dr Dachman's time and leave records were rewritten on or about August 1997

20. The original time and attendance records have been destroyed

21. Exhibit 8 is authentic

22. Employees, other than Dr Dachman, were not required to fill out an SF-71 form prior to leaving work early on any given day

23. Exhibit 9 is authentic

* * *